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IN THE

Supreme Court of the United States

October Term, 1984

NORTHEAST BANCORP, INC.,
UNION TRUST COMPANY and CITICORP,
Petitioners,

— against —

THE BOARD OF GOVERNORS OF
THE FEDERAL RESERVE SYSTEM,
Respondent,

— and —

BANK OF NEW ENGLAND CORPORATION, CBT CORPORATION, HARTFORD NATIONAL CORPORATION, THE COMMONWEALTH OF MASSACHUSETTS, THE STATE OF CONNECTICUT and BANK OF BOSTON CORPORATION,
Intervenor-Respondents.

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

At issue in this case is the constitutionality of reciprocal Massachusetts and Connecticut statutes that permit local bank holding companies to offer full banking services throughout a multi-state region but exclude companies from states outside that region from offering such services anywhere in the region. The Federal Reserve Board has noted that these statutes, and the interstate compact of which they are a part, raise "issues of considerable importance because no fewer than 15 state legislatures are considering proposals that, if enacted, would create regional banking systems in every part of the country" (A37).* Board Chairman Volcker has stated that such state-established regional banking systems, created by multi-state compacts, would be a new form of Balkanization of the banking industry (A201).

Despite its admitted concern about the constitutionality of the Massachusetts and Connecticut statutes, the Board accepted their validity based on an "assumption of constitutionality" (A197). The Court of Appeals affirmed, expressly sustaining the constitutionality of those laws. The questions presented are as follows:

1. Has Congress authorized confederations of states to create interstate banking regions through multi-state compacts that permit full service banking within the region by bank holding companies located there, but boycott the bank holding companies located in states outside the region?

2. Absent authorization by Congress, does such Balkanization of interstate banking through regional compacts violate the Commerce Clause and the Compact Clause of the Constitution?

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* The Appendix to the Petition is cited as "(A——)."

Parties to the Proceeding

The caption of the case in this Court lists all parties to the proceeding. The statement required by Rule 28.1 is extensive and is set forth at A1 to A20.

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No. 84-

IN THE

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October Term, 1984

NORTHEAST BANCORP, INC., UNION TRUST COMPANY and CITICORP,

Petitioners,

— *against* —

THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

Respondent,

— and —

BANK OF NEW ENGLAND CORPORATION, CBT CORPORATION, HARTFORD NATIONAL CORPORATION, THE COMMONWEALTH OF MASSACHUSETTS, THE STATE OF CONNECTICUT and BANK OF BOSTON CORPORATION,

Intervenor-Respondents.

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully request that a writ of certiorari be issued to review the decision and judgment of the United States Court of Appeals for the Second Circuit, entered on August 1, 1984, which affirmed: the order of the Board of Governors of the Federal Reserve System (the "Federal Reserve Board" or the "Board"), dated March 26, 1984, approving the merger of intervenor Bank of New England

Corporation ("BNE") and intervenor CBT Corporation ("CBT"); the Board's order, also dated March 26, 1984, approving the acquisition by intervenor Hartford National Corporation ("HNC") of Arltru Bancorporation, Inc. ("Arltru"); and the Board's order, dated May 18, 1984, approving the acquisition by intervenor Bank of Boston Corporation ("BBC") of Colonial Bancorp, Inc. ("Colonial").

Opinions Below

The opinion of the Court of Appeals is not yet reported (A21-A33). The Board's order regarding the BNE-CBT transaction is reported at 70 Fed. Res. Bull. 374 (1984) (A34-A71). The Board's HNC-Arltru order is reported at 70 Fed. Res. Bull. 353 (1984) (A72-A78), and the Board's BBC-Colonial order is reported at 70 Fed. Res. Bull. 524 (1984) (A79-A87).

Jurisdiction

The judgment of the Court of Appeals was entered on August 1, 1984 (A21-A33). This Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

This case involves the Commerce Clause (art. I, § 8, cl. 3) and the Compact Clause (art. I, § 10, cl. 3) of the United States Constitution; 12 U.S.C. § 1842(d) (the "Douglas Amendment"); a Connecticut statute, 1983 Conn. Act 83-411 (Reg. Sess.); and a Massachusetts statute, Mass. Gen. Laws Ann. ch. 167A § 2 (West 1971 & Supp. 1984). These constitutional and statutory provisions are reproduced at A95 through A102.

Statement of the Case

1. *Petitioners.* Petitioner Northeast Bancorp, Inc. ("Northeast") is a bank holding company organized under Connecticut law. Its wholly-owned subsidiary, petitioner Union Trust Company ("Union Trust"), is a Connecticut bank that competes directly with banks owned by respondents CBT, HNC and Colonial, among others. On August 3, 1983, Bank of New York Corporation, a New York bank holding company, agreed to acquire the stock of Northeast subject to Board approval and passage of enabling legislation by the State of Connecticut and the federal government.

Petitioner Citicorp is a bank holding company with its principal place of business in New York. Through its bank and non-bank subsidiaries, Citicorp offers a variety of financial services to consumers and businesses in New York, New England and elsewhere in the country (A224-A225). However, because of the regional restriction provisions of the Connecticut and Massachusetts statutes challenged in this case, Citicorp is unable to offer full service banking in either of those states.

2. *The Bank Holding Company Act.* Congress has established a banking system in which the nation's banks and bank holding companies are subject to dual federal and state regulation. As part of this two-tiered system, Congress in 1956 enacted the Bank Holding Company Act (the "BHCA"), 12 U.S.C. §§ 1841 *et seq.*, which provides, *inter alia,* that a bank holding company[1] may not acquire a bank[2] unless the transaction has been approved by the Federal Reserve Board pursuant to specified competitive, financial and other standards. *See* 12 U.S.C. § 1842(a). Section 3(d) of the BHCA, 12 U.S.C. § 1842(d), commonly referred to as

1. A "bank holding company" is defined, for purposes of the BHCA, as a company that controls any bank or bank holding company. *See* 12 U.S.C. § 1841(a)(1).

2. In relevant part, 12 U.S.C. § 1841(c) defines a "bank" as an "institution . . . which (1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans."

the Douglas Amendment, prohibits the Board from approving any acquisition of a bank located in one state by a bank holding company with its principal place of operations in another state, unless

> "the acquisition . . . is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication."

3. *The New England Compact.* Recognizing the current trend toward nationwide banking,[3] yet unwilling to expose its bank holding companies to the rigors of open competition, Massachusetts enacted the nation's first regionally restrictive interstate banking statute (the "Massachusetts Act") on December 30, 1982.[4] This law authorizes an out-of-state bank holding company to acquire control of a Massachusetts bank if:

> 1. the home state of the acquiring bank holding company grants reciprocal rights to Massachusetts bank holding companies (the "reciprocity provision"); and
>
> 2. the acquiring bank holding company is a "New England bank holding company"—that is, it has its principal place of business in Connecticut, Maine, Vermont, New Hampshire or Rhode Island and is not owned by a company with its principal place of business outside of those states or Massachusetts ("New England") ("the regional restriction provision").

According to its principal sponsor, State Senator John Brennan, the Massachusetts Act was specifically intended to exclude New York bank holding companies, in order to give local companies "the space to grow" (A189). In

3. *See, e.g.*, A170-A172 and A184.

4. Mass. Gen. Laws Ann. ch. 167A, § 2 (West 1971 & Supp. 1984) (A101-A102).

summarizing a draft of the bill that eventually became the Massachusetts Act, the Research Staff of the Massachusetts House Committee on Banks and Banking noted that the purpose of the bill was:

> "to establish in the General Laws [of Massachusetts] the necessary authority for a regional, New England, banking system . . . [and] to ensure that only New England based financial institutions can avail themselves of this authority." (A150).

The Massachusetts Act could have no meaning without reciprocal legislation in some or all of the other New England states. To obtain such legislation, Senator Brennan convoked a meeting of bankers, regulators, legislators and others from the several New England states in February 1983, and embarked upon a campaign to convince other New England states to "join the Massachusetts plan and set up a real New England system" (A189; A162-A168).

Senator Brennan and his followers were successful in their efforts to obtain additional state regional interstate banking statutes. On June 8, 1983, Connecticut responded by enacting interstate banking legislation with reciprocity and regional restriction provisions modeled on the Massachusetts Act.[5] The legislative history of the Connecticut Act manifests in even greater detail the same concerted, exclusionary purpose as that of the Massachusetts Act.[6]

5. 1983 Conn. Act 83-411 (A97-A99). The Connecticut Act also provides that a bank holding company loses its status as a "New England bank holding company" if it or its parent acquires or establishes any bank that has its main office or principal place of business outside of New England.

6. *See, e.g.*, Conn. Sen. Debate (Statement of Senator Sullivan) ("[W]e thought that [we should act] to give our banks in Connecticut time to gird for the eventual coming of wide-open interstate banking . . . in order to give our banks in Connecticut time to merge and consolidate and purchase some of the New England banks around and get as large as they possibly can . . . .") (A159). *See also* Senate Debate (A160); House Debate (A157-A158).

On May 17, 1983, Rhode Island enacted similar reciprocal, regionally restrictive legislation (the "Rhode Island Act").[7]

The proponents of the New England Compact also attempted to persuade Congress to authorize regional interstate banking compacts. *See* Resolution of the Caucus of the New England State Legislatures (A161). Although United States Senator Paul E. Tsongas and United States Representative Barney Frank, both of Massachusetts, jointly sponsored a bill in Congress that would have given federal approval to such compacts (A190-A191), neither this nor other similar legislation that would have authorized state-created regional banking zones has been enacted.[8]

Under the New England Compact, bank holding companies from favored states may consolidate and control full service banks on an interstate basis, thereby increasing their capital bases, attractiveness to customers and general competitive strength (A234-A237). In contrast, non-New England bank holding companies—such as Citicorp and Bank of New York—are barred from controlling a bank in those states, regardless of whether their home states have enacted otherwise reciprocal legislation; and Connecticut, Massachusetts and Rhode Island companies—such as Northeast—are therefore unable to serve their shareholders and customers by combining with desirable non-New England firms.

The New England Compact has served as both a model and catalyst for the creation of other exclusionary regional compacts across the country (A230-A233). This unprecedented collective action is having a profound effect on the structure of the nation's banking system, as groups of states band together to partition the country into regional banking confederations.

4. *The Present Controversy.* New England bank holding companies quickly sought to take advantage of the Massachusetts and Connecticut Acts. On July 11, 1983,

7. R.I. Pub. Law S. 0661 Sub. A (A103-A106). The regional restriction provision of the Rhode Island Act expires on July 1, 1986.

8. *See* Statement of C.T. Conover, Comptroller of the Currency, Before the Committee on Banking, Housing and Urban Affairs (A206).

BNE, a Massachusetts bank holding company with twelve bank subsidiaries, and CBT, the largest Connecticut bank holding company, agreed to merge. Two months later HNC, another Connecticut bank holding company, agreed to acquire Arltru, the owner of a Massachusetts bank. And, in November 1983, BBC, a Massachusetts bank holding company and the largest such company in New England, agreed to acquire Colonial, the owner of a Connecticut bank.

In their applications to the Board for approval of their respective consolidations, BNE, HNC and BBC contended that the Connecticut and Massachusetts Acts authorized the Board to approve their transactions under the Douglas Amendment. As interested parties that would be injured by consummation of the proposed consolidations, petitioners each challenged one or more of these applications.[9] Petitioners contended that these statutes violate the Commerce Clause and the Compact Clause, and do not fall within the exception to the Douglas Amendment's general prohibition against interstate banking. Thus, petitioners contended that the Board lacked authority to approve these consolidations.

Conceding that it has no expertise concerning the constitutional issues raised in this case, the Board stated that it would approve the challenged transactions unless it found that the Massachusetts and Connecticut Acts were "clear-[ly] and unequivocal[ly]" unconstitutional (A41). The Board found that this novel standard of review had not been met and therefore approved the transactions; however, its specific findings directly support petitioners' position that the Massachusetts and Connecticut Acts are unconstitutional.

The Board recognized that the regionally restrictive Connecticut and Massachusetts Acts were enacted for purposes of economic protectionism (A57-A60). It also found

9. Citicorp challenged each of these applications before the Board. Northeast and Union Trust challenged the BNE-CBT application and were granted the right to intervene in the appeal from the HNC-Arltru order (A94). The Second Circuit subsequently consolidated the BBC-Colonial appeal with the appeal from the other two orders.

that this discrimination against interstate commerce was suspect because these statutes are not the product of unilateral conduct, but are part of an interstate compact that imposes these burdens on a multi-state basis (A51-A52).

Consequently, the Board declared that the Connecticut and Massachusetts Acts violate the Commerce and Compact Clauses unless they are saved by the Douglas Amendment (A58; A52). The Board also found that neither the terms of the Douglas Amendment nor its legislative history clearly demonstrates that Congress intended to allow states jointly to discriminate in the manner of the New England Compact.[10]

Given these findings, it is not surprising that the Board expressed serious doubts about its own decision.[11] Indeed, as Board Chairman Paul A. Volcker later advised Congress, the Board acted simply on an "assumption of constitutionality" when it approved the applications (A197); and, according to Chairman Volcker, the Board perceives "serious questions both about the constitutionality of such arrangements and their implications for public policy" (A199).

On review pursuant to 12 U.S.C. § 1848, the Court of Appeals affirmed. In rejecting petitioners' Commerce Clause contentions, the court assumed that the challenged state statutes are unconstitutional absent Congressional authorization. Although it cited no statutory language or legislative history that reflected such authorization, the Second Circuit concluded that the Massachusetts and Connecticut Acts were sanctioned by the Douglas Amendment (A31). With regard to the Compact Clause, the Court of Appeals did not dispute the Board's finding

10. The Board stated that "the Douglas Amendment does not appear *on its face* to authorize discrimination" (A65) (emphasis in original), and that the legislative history shows "no discussion of the power to discriminate among potential out-of-state entrants" (A66).

11. The Board's orders specifically recognized that its tentative resolution of the "fundamental and unique constitutional issues" inherent in multi-state arrangements such as the New England Compact was "not free from doubt" (A41; A83).

that these reciprocal statutes are part of an interstate compact, but held that the compact does not require consent from Congress because it does not "increase the political power of the New England states or encroach upon or interfere with the just supremacy of the United States" (A32). The court failed to explain how the creation by a group of states of an exclusionary banking region could not have such effects, except to indicate its agreement with the Board's unsupported view that, by enacting the Douglas Amendment, Congress renounced all interest in the regulation of interstate banking (A29).

Reasons for Granting the Petition

The Court of Appeals has decided questions of critical importance to both banking institutions across the country and their federal regulators. Review by this Court is warranted because the Court of Appeals has rendered a decision that conflicts with past decisions of this Court and will open the door to state-created, regional Balkanization of a vital sector of interstate commerce. Prompt review is essential to avoid permanent harm to states and banking institutions injured by this new form of Balkanization, and to avoid serious disruption in the administrative functions of the Federal Reserve Board.

I. Whether States May Enact Regionally Restrictive Statutes That Create Exclusionary Banking Zones Is An Important Constitutional Question That Should Be Resolved By This Court

The straightforward but immensely important question presented in this case is whether groups of states acting in concert may, without Congressional approval, partition the nation into exclusionary banking regions, regardless of the effects of such action on the co-equal sovereign states that are barred from those regions and on the system of bank regulation established by Congress. As the Board has recognized, the decision in this case "will have effects far beyond the facts of the particular acquisition and

merger herein," and will affect the very structure of our nation's banking system (A251).[12] The Board explained that:

> "The regional interstate banking system developing in New England raises issues of considerable importance because no fewer than 15 state legislatures are considering proposals that, if enacted, would create regional banking systems in every part of the country. The Georgia legislature has already passed a regional interstate banking statute, and there are proposals for regional banking systems in the Southeast (Florida and Georgia and a combination of other states as far north as Virginia), the Northwest (Washington, Oregon and Idaho), the Mid-Atlantic (New Jersey, Pennsylvania and several other states as far south as Virginia) and the Mid-West (several different regional groupings under discussion). Both the increasing number of states considering such proposals and the progress of the proposed legislation toward enactment suggest that, should the New England interstate banking zone be upheld, a system of regional zones may develop involving major areas of the nation." (A37-A38).

In the map set forth on the following page, the Federal Reserve Bank of Boston graphically depicted these new

12. Recognizing the importance of banking to the national economy, this Court has not hesitated to review by writ of certiorari cases raising questions concerning the structure of the banking system. *See, e.g., Securities Industry Association* v. *Board of Governors*, —— U.S. ——, 52 U.S.L.W. 4962 (1984) (allowing bank holding company acquisition of "discount" securities brokerage affiliates); *Securities Industry Association* v. *Board of Governors*, —— U.S. ——, 52 U.S.L.W. 4943 (1984) (disapproving efforts by banks to underwrite commercial paper); *Bankamerica Corp.* v. *United States*, —— U.S. ——, 103 S. Ct. 2266 (1983) (permitting management interlocks between bank holding companies and competing insurance companies); *Board of Governors* v. *Investment Company Institute*, 450 U.S. 46 (1981) (allowing bank holding company operation of closed-end investment companies); *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27 (1980) (invalidating state laws discriminating against investment advisory and trust subsidiaries of out-of-state bank holding companies); *Investment Company Institute* v. *Camp*, 401 U.S. 617 (1971) (disapproving bank operation of open-end investment companies).

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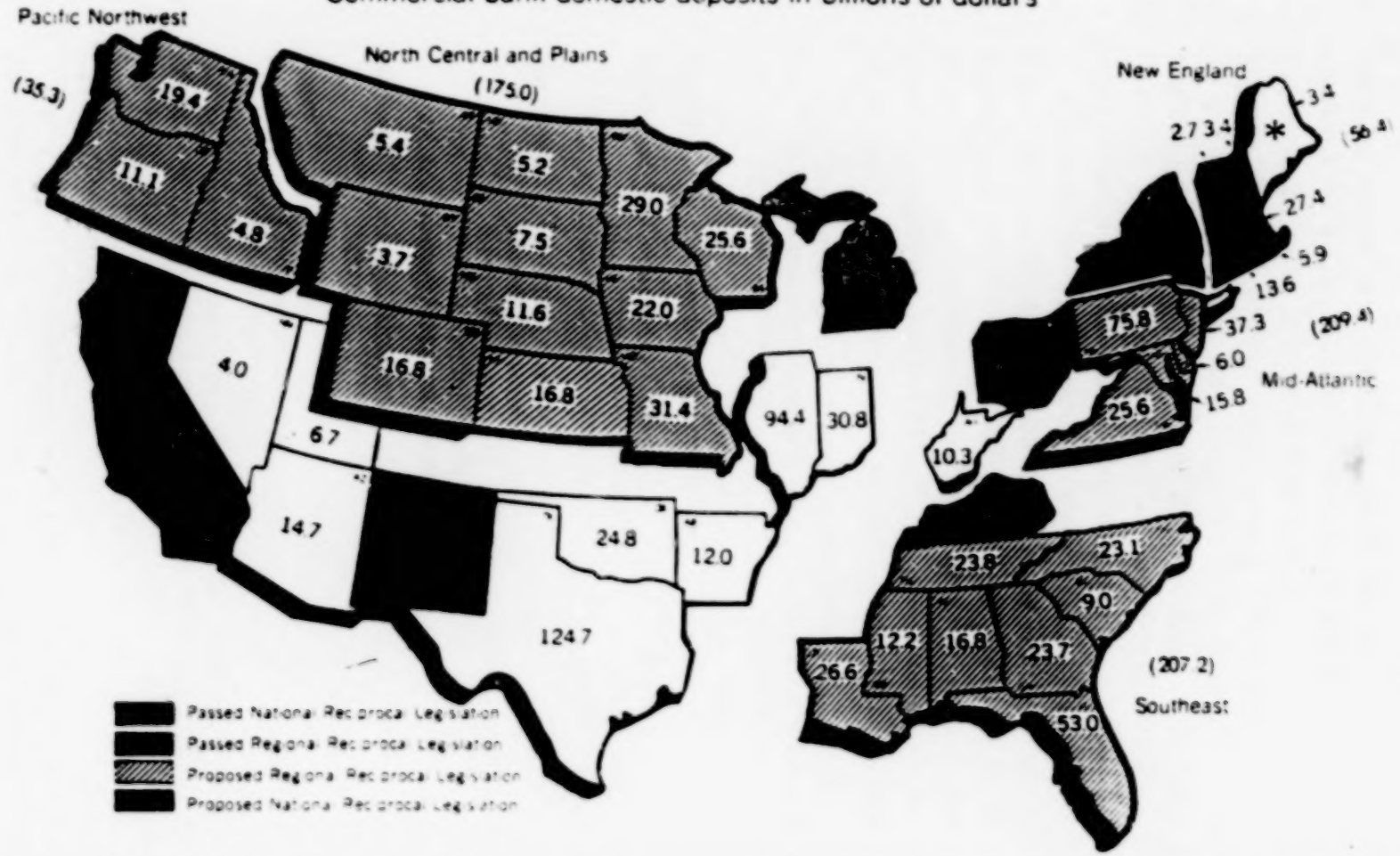
Proposed Interstate Banking Regions

Commercial bank domestic deposits in billions of dollars



*Maine passed a law in July 1975 allowing interstate banking with a reciprocal provision but that provision was rescinded on February 7, 1984.

Note: Alaska passed legislation in 1982 which allows interstate banking through holding companies on a national basis with no provisions for reciprocity. Georgia's legislature on February 13, 1984 passed a regional reciprocal interstate banking bill which is awaiting the governor's approval. Rhode Island's law provides for reciprocity in New England on July 1, 1984 and reciprocity in the nation to go into effect on July 1, 1986. This map only includes proposed interstate banking regions announced through mid-March 1984. Banking groups, state legislatures and other interested parties proposed these regions but they are not definitive. In fact, new ones are constantly being considered and proposed. Regional domestic deposits are shown in parentheses.

Source: Domestic deposit data as of June 30, 1983: Report of Condition Tape, FRS, FDIC, Comptroller of the Currency.

banking zones—all of which exclude the principal boycotted states, New York, Illinois, Texas and California. This Balkanizing process is proceeding apace: since the Board's March 26, 1984 orders were issued, Florida, North Carolina, South Carolina and Utah all have enacted additional regionally restrictive interstate banking statutes, and Georgia, Florida, North Carolina and South Carolina have established a new Southeast banking region (A232; A245).[13]

Besides the transactions challenged in this case, four other proposed acquisitions allegedly authorized by regionally restrictive interstate banking statutes have now come before the Board, and yet another acquisition has been announced (A244-A245).[14] One of those transactions, intervenor BBC's proposed acquisition of RIHT Financial

13. The rapid spread of this discriminatory legislation is illustrated by the statutes enacted and bills introduced between 1982 and 1984 in the state legislatures:

Region	*State Enacting or Considering Legislation*	*Principal States Boycotted*
Northeast	Connecticut (enacted) Massachusetts (enacted) Rhode Island (enacted)	New York, Texas Illinois and California
Southeast	Georgia (enacted) Florida (enacted) Kentucky (enacted) North Carolina (enacted) South Carolina (enacted)	"
Midwest	Iowa, Minnesota, Missouri Nebraska, Wisconsin	"
West	Arizona Oregon (enacted) Utah (enacted)	"

Ga. H.B. 1198 (1984); Fla. C.S.H.B. 795 (1984); Ky. H.B. 67 (1984); N.C. S.B. 706 (1984); S.C. S.B. 959, H.B. 3743 (1984); Or. H.B. 2149 (1983); Utah S.B. 9 (1984); Ariz. H.B. 2117; Iowa S.B. 512; H.B. 2113; Minn. S.B. 1837; Mo. H.B. 1239; Neb. L.B. 1069; Wis. A.B. 800.

14. Citicorp has challenged each interstate bank transaction that has come before the Board under the purported authority of a regionally restrictive statute.

Corporation, a Rhode Island bank holding company, was recently approved by the Board (A193). If the Second Circuit's decision stands unreviewed, numerous additional states will adopt discriminatory legislation, and other bank holding companies will seek to consolidate under such statutes in order to gain a competitive advantage.

As states hasten to create regional banking systems, certain states inevitably will be excluded. Such blatant discrimination will pit state against state, and has the potential to trigger retaliatory action in banking and other fields.[15] For example, the present controversy sets the political and economic interests of New York, the target of the exclusionary New England Compact, against those of its next door neighbors, Connecticut and Massachusetts. Governor Rice of the Federal Reserve Board has graphically described the discriminatory impact of this state legislation:

> "[T]he regional laws clearly discriminate against those states that are headquarters for the nation's largest banking organizations. None of the proposed regional zones would include New York. Utah's law allows reciprocal entry from Hawaii and all the Western states except California. Not surprisingly, the constitutionality of these laws is being challenged, and Board approvals of applications under the regional laws are being stayed pending court decisions. . . . These [laws present] difficult questions and their resolution by the courts may produce landmark decisions on states' rights and the national interest." (A202).

Nor is this discrimination against certain sister states the sole harm resulting from these banking compacts. By adding a third level of regulatory authority, the creation of

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15. *See Great Atlantic & Pacific Tea Co.* v. *Cottrell,* 424 U.S. 366, 380 (1976) (parochial legislative policies can "open 'the door to . . . rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation.'"), quoting *Baldwin* v. *G.A.F. Seelig, Inc.,* 294 U.S. 511, 522 (1935).

these state-established banking zones collides with the dual system of bank regulation established by Congress.

The regional banking pacts approved by the Second Circuit will also subject the nation's banking system to substantial confusion and mischief. The haphazard nature of the regional laws enacted to date has been noted by the bank regulators:

> "Inconsistencies are already developing as states select their regional partners. For example, the Georgia law would allow entry by Kentucky banks, but the Kentucky law only allows entry by banks in states immediately adjacent to Kentucky."

Remarks by Emmett J. Rice, Member, Board of Governors of the Federal Reserve System (June 21, 1984) (A201-A202). Such inconsistencies will lead to artificial divisions and unintended fragmentation of our economic system by the creation of sub-regions and other banking "districts" never contemplated by Congress.[16]

Moreover, the Board is currently forced to grapple with Bank acquisition applications without definitive guidance on the constitutionality of such laws, with no assurance that such laws ultimately will be upheld, and with the certainty only of continuous burdensome litigation. Without an authoritative resolution by this Court of the constitutionality of these regionally restrictive statutes, the Board will continue to struggle with such difficulties, and the parties will continue to litigate across the country.

Such widespread litigation would be extremely wasteful. Additionally, if another federal court of appeals or this Court later determines that such discriminatory leg-

16. These regionally restrictive statutes further impede the flow of commerce by frustrating the policies of other states. The Connecticut Act, for instance, extracts a high price from New England companies that desire to control a Connecticut bank. If they want to do so, they cannot own a bank in any non-New England state. *See supra* at 5 n.5. Thus, while, for example, Alaska has enacted a statute allowing a bank holding company from any state to acquire an existing Alaska bank (Alaska Stat. § 06.05.235), the Connecticut Act bars a New England company from acquiring such a bank if it wants to own a bank in Connecticut (A99).

islation is unconstitutional and therefore an impermissible predicate for interstate bank acquisitions, the only effective remedy would be to unscramble a substantial number of completed acquisitions across the country, at great cost to shareholders and public confidence in the banking system.

It is simply inconsistent with the concept of the federal Union established by the Constitution for confederations of states to establish preferential trade regions and regulate a vital portion of interstate commerce under a discriminatory regime that boycotts disfavored states:

> "The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division."

Great Atlantic & Pacific Tea Co. v. *Cottrell*, 424 U.S. 366, 380-81 (1976), quoting *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935).[17] This reason in itself warrants review by this Court, as does the pointed conflict between the parties to the New England Compact and the states excluded by that arrangement. Such multi-state disputes are similar to original controversies before this Court—controversies that history has proven can only be resolved authoritatively by this Court.

The decision below also deals a heavy blow to Congressional policy. The Court of Appeals imputed to Congress an intent in the Douglas Amendment to confer upon state confederations the power to impose a pernicious form of discrimination. This is a serious misconstruction of Congressional intent. As the language of the statute and its legislative history establish, Congress never even considered the possibility of such concerted, regional discrimi-

17. *Accord* The Federalist Papers, No. 7 at 62-63 (Rossiter ed. 1967) ("Each . . . separate confederacy . . . would pursue a system of commercial policy peculiar to itself. This would occasion distinctions, preferences and exclusions, which would beget discontent.").

nation, much less embraced it. *See infra* at 15-18. Moreover, the Second Circuit's view altogether ignores this Court's conflicting construction of the Douglas Amendment in *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27 (1980). *See infra* at 16.

II. Certiorari Should Be Granted Because The Decision Of The Second Circuit Conflicts With The Decisions Of This Court

The need for review of this case is highlighted by the failure of the Second Circuit to follow the decisions of this Court in deciding the constitutionality of these exclusionary regional banking arrangements.

1. The Douglas Amendment Does Not Authorize the Connecticut and Massachusetts Acts

The principal ground for the Second Circuit's decision was its "belief" that the Douglas Amendment authorizes any type of discriminatory banking confederation a state or group of states might choose to fashion. Significantly, the court was unable to adduce any statutory language or specific legislative history to support that belief.

That the Court of Appeals could find no support for this unprecedented result is hardly surprising. In passing the BHCA in 1956, Congress had no intention to grant the states unbounded power to restructure the nation's banking system in any way they pleased, to the detriment of other co-equal sovereign states and the Congressional dual system of bank regulation.

The language of the Douglas Amendment speaks solely to the statute laws of a single host "State," allowing it by the enactment of a valid law to lift the general ban on interstate bank transactions with regard to the acquisition of banks within that state. Congress' language does not in any way suggest that states were authorized to discriminate among their sister states, or to form regional alliances to promote local commerce while boycotting commerce from disfavored states. As this Court explicitly

recognized in *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 47 (1980):

> "Preliminarily, it is doubtful that § 3(d) authorizes state restrictions of any nature on bank holding company activities. The language of the statute establishes a general federal prohibition on the acquisition or expansion of banking subsidiaries across state lines. The only authority granted to the States is the authority to create exceptions to this general prohibition, that is, to *permit* expansion of banking across state lines where it otherwise would be federally prohibited."

(emphasis in original; footnote omitted). Thus the Board correctly found that:

> "[t]he Douglas Amendment does not appear *on its face* to authorize discrimination by Connecticut in favor of its own residents and those of Massachusetts and other New England states having reciprocal laws, but against all other states."

(A65) (emphasis in original).[18]

Like the plain language of the statute, the legislative history of the Douglas Amendment provides no indication that Congress intended to allow the states to discriminate among sister states or Balkanize the banking system by adopting exclusionary trade zones. As the Board expressly recognized, "[t]he Douglas Amendment was proposed during the debate on the Senate floor and there is no committee report or other significant legislative history to clarify its meaning" (A66).

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18. The ability of a state under the Douglas Amendment to lift the federal prohibition on interstate acquisitions does not provide such authorizaion, because it does

> "not indicate that Congress wished to remove federal constitutional constraints on such state laws. The negative implications of the Commerce Clause, like the mandates of the Fourteenth Amendment, are ingredients of the *valid* state law to which Congress has deferred."

Sporhase v. *Nebraska*, 458 U.S. 941, 959-960 (1982) (emphasis in original).

In enacting the BHCA, Congress was concerned with the scope of *its* prohibition, not with any state action that might be taken outside of that federal proscription (A66). It was simply not anticipated in 1956 that any state would permit its banks to be acquired by out-of-state bank holding companies.[19] The manner in which a state might elect to permit interstate banking was never even considered.[20] And Congress certainly never envisioned that groups of states might join together to restructure the banking system.[21] The legislative history of the BHCA in general is replete, however, with references to Congress' desire to

19. Representative Spence, the sponsor of the House bill, told Congress that he found no material difference between the BHCA, as amended by Senator Douglas, and the original House proposal, which would have totally prohibited interstate bank acquisitions. 102 Cong. Rec. 7165 (1956) (A118). During the Senate debate, Senator Bricker stated that "in effect, [the Douglas Amendment] constitutes an absolute prohibition against future expansion by bank holding companies." *Id.* at 6861 (A112-A113). *Accord* Statement of Senator Capehart, *id.* at 6934 ("under the proposed legislation we are pretty much freezing the banking system of America") (A117); Statement of Senator Douglas, *id.* at 6860 (A111-A112).

20. Thus, with respect to the question whether discrimination among out-of-state bank holding companies had been authorized by Congress, the court in *Iowa Independent Bankers* v. *Board of Governors*, 511 F.2d 1288, 1296 (D.C. Cir.), *cert. denied*, 423 U.S. 875 (1975), stated that "[n]ot once in the entire debate is the . . . question raised." Similarly, the Board stated that there was "no discussion [in Congress] of the power of the states to discriminate among potential out-of-state entrants" (A66).

21. To the contrary, testimony before Senator Douglas' committee specifically emphasized that the proposed bank holding company legislation "maintain[ed] the autonomy of the *separate* states." Bank Holding Legislation: Hearings on S. 76 and S. 1118 Before the Senate Committee on Banking and Currency, 83rd Cong., 1st Sess. 136 (1953) (A129) (emphasis added). Indeed, Congress expressly rejected proposals that would have authorized a "trade-area" or other regional approach to interstate banking. Control of Bank Holding Companies: Hearings on S. 880, S. 2350 and H.R. 6227 Before the Subcommittee of the Senate Committee on Banking and Currency, 84th Cong., 1st Sess. 140 (1955) (rejecting suggestions to allow bank holding companies to operate under "a trade area approach such as a Federal Reserve district . . . .") (A120-A121). *See* H.R. Rep. No. 609, 84th Cong., 1st Sess. 203 (1955) (A132-A133).

assure that the statute was nondiscriminatory and did not favor any particular state or region.[22]

This Court repeatedly has held that an Act of Congress should not be construed to abrogate the limitations imposed on states by the Commerce Clause unless the federal law unmistakably authorizes the state conduct at issue. *See South-Central Timber Development, Inc.* v. *Wunnicke*, —— U.S. ——, 104 S.Ct. 2237, 2242 (1984) ("for a state regulation to be removed from the reach of the dormant Commerce Clause Congressional intent must be unmistakably clear").[23] Where no support for such an interpretation may be gleaned from the statutory language or legislative history, a state may only act in a manner consistent with the provisions of the Constitution—it may

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22. *See, e.g.*, 101 Cong. Rec. 8180-81 (1955) (Rep. Keating) ("It strikes me that if we are going to enact a bill, which I think we need, we should enact one that applies throughout the Nation and equally to all institutions") (A107); *id.* (Rep. Brown) (A108-A109); *id.* at 8184 (Rep. Smith) (A110-A111).

23. In *Sporhase* v. *Nebraska*, 458 U.S. 941 (1982), this Court declined to find Congressional authorization for state-imposed burdens on interstate commerce in ground water despite 37 federal statutes and a number of Congressionally approved interstate compacts that demonstrated Congress' deference to state water law. This Court held that, if Congress intended to consent to the states' "unilateral imposition of unreasonable burdens on commerce," that intent would have been expressly stated. *Id.* at 960 (emphasis in original).

Similarly, in *New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 343 (1982), this Court rejected the claim that state regulations inconsistent with the Commerce Clause were authorized by a provision in the Federal Power Act, reasoning:

> "[W]hen Congress has not 'expressly stated its intent and policy' to sustain state legislation from attack under the Commerce Clause, *Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408, 427, 431 (1946), we have no authority to rewrite its legislation based on mere speculation as to what Congress 'probably had in mind.'"

not discriminate against or unduly burden interstate commerce.[24]

Similarly, the Compact Clause prohibits any interstate compact that would injure sister states or impair federal interests unless Congress has sanctioned that compact. *See, infra* at 24. Absent such authorization, the creation of such divisive, regional confederations is forbidden.

Under these standards, it cannot seriously be contended that in 1956—when it believed it was eliminating interstate banking altogether—Congress actually intended to allow confederations of states to partition the nation's banking system and adopt preferential trade zones in any way they might choose. If it had intended to abandon its authority so as to allow states to create such a "multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause,"[25] Congress certainly would have said so in a way that no one could mistake. It did not, and the Board so found (A66-A67).[26]

2. The Massachusetts and Connecticut Acts Violate the Commerce Clause

The Commerce Clause grants Congress authority to "regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. This Court has held that the "pur-

24. The Second Circuit mischaracterized petitioners' position, stating that it had "considered [and rejected] the argument that the Massachusetts and Connecticut statutes . . . must either permit all bank holding companies . . . to acquire their banks or permit none" (A29). Petitioners simply maintain that, in enacting interstate bank acquisition statutes, the states are subject to traditional standards governing discriminatory statutes—they may differentiate among bank holding companies, but only in a way that does not violate the Constitution.

25. *Great Atlantic & Pacific Tea Co.* v. *Cottrell*, 424 U.S. 366, 380 (1976).

26. Section 7 of the BHCA, 12 U.S.C. § 1846, referred to by the Second Circuit (A30), does not support the court's conclusion. That provision simply declares that the BHCA does not, of its own force, displace existing valid state banking regulations under the Supremacy Clause. *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 49 (1980).

pose of the Commerce Clause was to create an area of free trade among the several States." *McLeod* v. *J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944). Thus, while the Commerce Clause speaks in terms of powers bestowed upon Congress, it has been construed by this Court, since *Cooley* v. *Board of Wardens*, 53 U.S. (12 How.) 299, 318 (1852), as also imposing limits on the power of the states to erect barriers against, or to impose burdens upon, interstate trade. This limitation is implicit in the Commerce Clause, which:

> "reflected a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation."

Hughes v. *Oklahoma*, 441 U.S. 322, 325-26 (1979).

This Court consistently has held that when state legislation is openly protectionist—that is, when it overtly discriminates against trade originating from a particular state or states in order to further local economic interests (or the interests of another group of states)—a *per se* rule of unconstitutionality will be applied.[27] When legislation promotes a legitimate state objective in an even-handed manner, the Court balances the state interests advanced by the law against the federal interest in unencumbered interstate commerce, and considers the duty of the state to further its valid interests with the least possible injury to interstate trade.[28]

The regional restrictions in the Connecticut and Massachusetts Acts violate the Commerce Clause under both

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27. *See, e.g., Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 36 (1980), citing *Philadelphia* v. *New Jersey*, 437 U.S. 617, 624 (1978). The nation's banking system directly affects interstate commerce, and the establishment or acquisition of a bank in one state by a bank holding company in another state is itself a substantial element of interstate commerce. 447 U.S. at 38-39.

28. *E.g., Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

the *per se* and the balancing tests. As the Board found, the statutes are *per se* invalid because they are blatantly protectionist measures that intentionally interfere with the domestic free market the Commerce Clause was designed to foster (A57-A58). The Board also found that, under this Court's decision in *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27 (1980), the Connecticut and Massachusetts Acts cannot withstand constitutional scrutiny even under the balancing test: "the disparate treatment of non-New England bank holding companies does not appear to be justified 'as an incidental burden necessitated by legitimate local concerns'" (quoting *Lewis*, 447 U.S. at 42) (A60).

Indeed, these statutes are *a fortiori* violations of the Commerce Clause because they do not constitute the action of a single state, but are part of a more objectionable arrangement by a group of states to discriminate against their sister states and form an insular banking region. This concerted conduct exacerbates the harm caused by the individual statutes and geometrically increases their burden on interstate commerce. Thus, the Board correctly recognized that the prohibitions of the Commerce Clause "are particularly applicable to state statutes that selectively confer benefits on one or more states" and deny those same benefits to other states (A56).[29]

In rejecting petitioners' Commerce Clause challenge, the court below assumed that the Connecticut and Massachusetts statutes violate these tests, but reasoned: "Congress may authorize the states to enact statutes which may interfere with interstate commerce. . . . However, congressional authorization must be clear" (A30) (citing cases). The court then held: "[w]e believe that by enacting the Douglas Amendment, the Congress authorized Massachusetts and Connecticut to enact the statutes challenged here" (A31).

While the Court of Appeals acknowledged the exacting standard that applies to this case, it failed to explain how

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29. *Accord Brimmer* v. *Rebman*, 138 U.S. 78, 82 (1891); *Milk Control Board* v. *Eisenberg Farm Products*, 306 U.S. 346, 351 (1939).

the Douglas Amendment provides the requisite "unmistakably clear" authorization. *See supra* at 15-17.[30] The court simply mentioned certain remarks by Senator Douglas during a floor debate which referred to the ability of the states to permit the entry of out-of-state bank holding companies "only to the degree that State laws expressly permit them," and which indicated that the Douglas Amendment paralleled the McFadden Act provisions concerning the power of national banks to branch intrastate and interstate (A28). Such isolated statements "are too fragmentary and unspecific to show congressional intent to authorize discrimination otherwise contrary to the Commerce Clause." Board Order, Appendix (A67).[31]

Moreover, these snippets from the floor debates do not suggest that the Douglas Amendment allows states to distinguish among bank holding companies in any manner they choose. Indeed, in referring to "them" generally (*i.e.*, to all "out-of-state bank holding companies"), Senator Douglas' statement, if anything, supports petitioners' view that the Douglas Amendment does not authorize discrimination among out-of-state bank holding companies in a manner that violates the Constitution.[32]

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30. As the Board recognized, *Iowa Independent Bankers* v. *Board of Governors*, 511 F.2d 1288 (D.C. Cir.), *cert. denied*, 423 U.S. 875 (1975), cited by the Second Circuit (A29-A30), "did not consider whether the alleged legislative authorization by the Douglas Amendment is express and unambiguous so as to sanction discrimination against interstate commerce that would otherwise run afoul of the Commerce Clause" (A69). *Iowa Bankers*, decided prior to this Court's decision in *Lewis*, involved neither the Commerce Clause nor the Compact Clause.

31. *See New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 342 ("Reliance on such isolated fragments of legislative history in divining the intent of Congress is an exercise fraught with hazards, and 'a step to be taken cautiously.' ") (citation omitted); *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 311 (1979) ("The remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history.").

32. Nor does the McFadden Act, 12 U.S.C. § 36, support the Court of Appeals' position. That *federal* law was enacted to grant national banks a power they did not have—the power to branch. Any practical ability a state may have under the McFadden Act to govern banks relates only to banks within that state, and cannot be exercised in a discriminatory fashion. *See First National Bank* v. *Walker Bank & Trust Co.*, 385 U.S. 252, 261 (1966).

The Court of Appeals also observed that "in permitting interstate acquisitions (albeit limited to New England), the Massachusetts and Connecticut statutes would appear to promote interstate commerce rather than restrict it" (A29). The argument apparently is that any state legislation allowing any interstate bank acquisition is, by definition, less burdensome than the total federal prohibition, and that the states therefore are free to impose whatever restrictions they might choose, no matter how discriminatory.

The Second Circuit cited no empirical evidence even suggesting that these regionally restrictive statutes promote commerce rather than restrict it. To the contrary, these reciprocal statutes dramatically restrict interstate commerce by boycotting the bank holding companies in the disfavored states, by inhibiting acquisitions by New England bank holding companies of non-New England banks, and by fragmenting the nation's banking system generally.

Moreover, any regional commerce purportedly fostered by restrictive state legislation is irrelevant when that legislation constitutes blatant discrimination by a group of states against co-equal sister states. The Second Circuit's opinion overlooks the principle of federalism embodied in the Commerce Clause. Neither logic nor Constitutional authority suggests that the ability of a state to permit commerce that otherwise would be federally prohibited is in any way equivalent to authority to discriminate against certain sister states. As consistently held by this Court, such a deviation from the federalist system established by the Constitution is *per se* unlawful as a violation of the very fabric of our Union. *See South-Central Timber Development, Inc.* v. *Wunnicke*, —— U.S. ——, 104 S.Ct. 2237, 2247 (1984).

The Court of Appeal's decision—which approves state-created Balkanization of the nation's banking system—directly conflicts with these well-established Commerce Clause principles.

3. The Massachusetts and Connecticut Acts Violate the Compact Clause

Under the Compact Clause,[33] any interstate compact or other arrangement that has the potential to increase the political power of the compacting states or otherwise encroach upon the exercise of federal authority is unconstitutional unless it has been approved by Congress. *See United States Steel Corp.* v. *Multistate Tax Commission*, 434 U.S. 452, 468, 472 (1978); *Virginia* v. *Tennessee*, 148 U.S. 503, 519 (1893).

Like the Commerce Clause, the Compact Clause embodies one of the fundamental precepts of our federal system of government. Deploring the chaos among the states under the Articles of Confederation, and the pattern of shifting alliances and dissension among the numerous German and Italian States of the period, the Framers of the Constitution decided to confer sovereignty in the United States upon only two entities: the individual states, with regard to their own internal affairs; and the federal government, with regard to matters of national concern. Between the individual states and the federal government, the Constitution left no room for any other sovereign, or for any regional confederation among the states.[34]

As the Board expressly found and the Second Circuit acknowledged, the reciprocal Massachusetts and Connect-

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33. U.S. Const. art. I, § 10, cl. 3.

34. *See H.P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. 525, 533-39 (1949); *Community Communications Co.* v. *City of Boulder*, 455 U.S. 40, 53-54 (1982).

The *Federalist Papers* demonstrate the grave concern of the Founding Fathers regarding interstate confederations. For example, Alexander Hamilton spoke specifically of the danger of "domestic factions and convulsions," and of "frequent and violent contests," arising from such "partial confederacies." *The Federalist Papers*, No. 6 at 54 (Rossiter ed. 1961). *See also id.*, No. 7 at 62-63; No. 8 at 66; No. 22 at 144. It was against this background of "sad experience" under the Articles of Confederation, that the Framers adopted the Compact Clause. Farrand, *The Framing of the Constitution*, 47-48, 153 (1976 ed.).

icut Acts,[35] which were the result of a series of meetings, discussions and other concerted activity,[36] constitute an interstate compact (A51; A32). Furthermore, as the Board found, despite the efforts of proponents of regional banking, Congress has neither expressly nor implicitly consented to the New England Compact (A52).[37]

Nevertheless, the Second Circuit rejected petitioners' Compact Clause argument, stating, without explanation, that it did "not think" that the New England Compact would "in any way increase the political power of the New England states or encroach upon or interfere with the just supremacy of the United States." The court also noted that, "if at any time Congress should find any encroachment, it could remove the encroachment by appropriate legislation."

This rationale plainly conflicts with the decisions of this Court. The protectionist, exclusionary New England Compact is intended to, and does, cause interstate divisiveness and antagonism, and acts as a barrier to harmonious, voluntary cooperation among the states within the federal Union. It prevents a uniform approach to interstate banking from which all states may benefit equally, and increases

35. The Board noted that the reciprocal "regional banking acts of Connecticut, Massachusetts and Rhode Island contain very similar provisions, and they were enacted within a six-month period . . . ." (A51). Such reciprocal legislation is in and of itself sufficient to constitute a compact. *United States Steel Corp.* v. *Multistate Tax Commission*, 434 U.S. 452, 470 (1978). *Accord* F. Frankfurter & J. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 Yale L.J. 685, 735-48 (1925) (compiling list of compacts which included a number of statutes passed by two or more states establishing rights common to all the states involved). *See also Virginia* v. *Tennessee*, 148 U.S. 503, 517-518 (1893). The Second Circuit agreed that, in light of their legislative history, the challenged statutes "could be considered as part of a plan or compact to create a regional banking system" (A32).

36. *See* Board Order, Appendix (A51).

37. This is not surprising, since Congress refused to adopt a 1981 Presidential proposal to allow interstate bank acquisitions on a regional basis, *see Report of the President (1981)* (A134-A149), just as it rejected entreaties for a regional approach to interstate bank holding company expansion when it enacted the BHCA in 1956.

the economic and political power of member states to the detriment of the excluded states (A208-A221). As this Court stated nearly 150 years ago, the Compact Clause was designed to guard against precisely such a "derangement of [a state's] federal relations with other states." *Rhode Island* v. *Massachusetts*, 37 U.S. (12 Pet.) 657, 726 (1838).[38]

The effort by the court below to limit the Compact Clause to narrowly-defined "political issues" is without support in the decisions of this Court. The Compact Clause guards against all forms of concerted state action that allow certain states to aggrandize themselves at the expense of other states or affect the ability of the federal government to govern matters within its purview.[39] Moreover, only a myopic interpretation of the word "political" would preclude recognition that the structure of the national banking system has important political implications.[40] In a society in which politics and economics interact so directly, the effort of Connecticut and Massachusetts to aggrandize themselves at the expense of other states is at its core a political act antithetical to the premise of our federal Union.[41]

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38. The Board correctly distinguished the New England Compact from the types of compacts that have survived constitutional challenge, because the latter "have not had the objective of discrimination but rather that of cooperation on a subject of exclusive interest to the states that are parties to these agreements" (A50). *See, e.g., New York* v. *O'Neill*, 359 U.S. 1, 6 (1959) (referring to such permissible compacts as "catalysts of cohesion").

39. *See, e.g., New York* v. *O'Neill*, 359 U.S. 1 (1959) (criminal justice); *United States Steel Corp.* v. *Multistate Tax Commission*, 434 U.S. 452 (1978) (taxation); *Virginia* v. *Tennessee*, 148 U.S. 503 (1893) (state boundaries). *See also Great Atlantic & Pacific Tea Co.* v. *Cottrell*, 424 U.S. 366, 379 n.13 (1976) (referring to the Compact Clause in a case involving regulation of the sale of milk).

40. *See* A208-A221; H.R. Rep. No. 609, 84th Cong., 1st Sess. 2-3 (1955) (A132-A133).

41. *See* F. Zimmermann & M. Wendell, *The Law and Use of Interstate Compacts* 23 (1976) (compacts which have a discriminatory effect upon non-party states "could be described as affecting

(footnote continued on next page)

Furthermore, the New England Compact does not just affect the balance of power among the states; it impinges on interstate banking, an area over which the federal government retains a "broad and comprehensive national authority . . . ." *Norman* v. *Baltimore & Ohio Railroad Co.*, 294 U.S. 240, 303 (1935).[42] The New England Compact harms the interest and supremacy of the federal government in this field by creating a new level of regulation —the multi-state region—not provided for by Congress in its regulation of interstate banking; by boycotting substantial sectors of the national banking system; and by undercutting significant federal policy.[43] Thus, it can hardly be claimed that the Massachusetts and Connecticut Acts "neither project a new presence onto the federal system nor alter any state's basic sphere of authority." *United States Steel Corp.* v. *Multistate Tax Commission*, 434 U.S. 452, 469 n.21 (1978).

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the political balance of the federal system"); Hawke, *Are State Laws Permitting Interstate Banking Constitutional?* American Banker (A182):

> "In one old Supreme Court case involving the Compact Clause, the court, quoting Story's "Commentaries on the Constitution," indicated that the consent of Congress may properly be required for interstate 'treaties of confederation, in which the parties are leagued for mutual government, political cooperation, and the exercise of political sovereignty. . . .' *Virginia* v. *Tennessee*, 148 U.S. 503, 519 (1893). 'Balkanization' of banking through narrowly limited reciprocal-entry legislation could be seen as presenting such concerns."

42. As this Court has stated, the vital federal interest in interstate banking is apparent from the "impressive array of federal statutes, regulating not only the provision of banking services but the formation of banking organizations . . . ." *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 38 (1980).

43. For example, in order to facilitate the salvage of failing or failed banks, 12 U.S.C. § 1823(f), part of the Garn-St Germain Depository Institutions Act of 1982, allows the FDIC to arrange acquisitions of such banks by out-of-state bank holding companies. The Connecticut Act undermines that federal policy by prohibiting New England bank holding companies from acquiring any non-New England bank if they wish to control a Connecticut bank. Significantly, 12 U.S.C. § 1823(f) was set forth as a specific exception to the federal ban against interstate bank acquisitions in a 1982 amendment to the Douglas Amendment.

Despite the adverse impact of the New England Compact on excluded states and federal interests, the Second Circuit implicitly endorsed the Board's unsupported view that the compact is constitutional because, in enacting the Douglas Amendment, Congress somehow renounced all federal interest in interstate banking (A29). This assertion ignores the independent purpose of the Compact Clause to ensure that states do not join together to aggrandize themselves and injure their sister states. Even total renunciation by the federal government of its interest in the regulation of interstate banking could not justify an effort by states to combine against and injure other, co-sovereign states.[44]

Furthermore, far from abandoning the matter of interstate bank holding company expansion to the unfettered discretion of the states, the Douglas Amendment affirmatively articulates *federal* policy in this area—that there shall be no interstate bank acquisitions except as each state, acting individually, may through the enactment of a valid statute make exceptions with regard to the acquisition of banks within its own borders. Recently amended in 1982 to comport with federal policy on the acquisition of failing banks,[45] the Douglas Amendment demonstrates that the federal government has a paramount interest in regulating the interstate expansion of bank holding companies, an interest that has been impaired by the effort of New England states to create a regionally restrictive interstate banking system.[46] Thus, the Second Circuit was plainly wrong in holding that in 1956, without a single word to show its intent, Congress totally abandoned a

44. *See Rhode Island* v. *Massachusetts*, 37 U.S. (12 Pet.) 657, 726 (1838) (Compact Clause intended "to guard against the derangement of [a state's] federal relations with other states of the Union").

45. *See supra* at 27 n.43.

46. The error in the Second Circuit's "renunciation" theory is confirmed by the fact that this case involves a petition for review of orders of a *federal* agency entrusted by Congress with approving bank acquisitions pursuant to Congressionally-established criteria.

critical field of interstate commerce to discriminatory Balkanization by the states.[47]

Finally, the Second Circuit erred in concluding that "if at any time Congress should find any encroachment it could remove the encroachment by appropriate legislation." This theory would authorize *any* compact—no matter how pernicious—simply because Congress could later invalidate it. That is not the law.

Conclusion

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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47. In contrast, when Congress chose to allow states to form regional compacts with regard to the transport of radioactive waste, it set forth in explicit terms its intent to authorize such compacts, and the terms upon which it would provide its approval. *See* 42 U.S.C. § 2021(b) *et seq.* (the Low-Level Radioactive Waste Act).

APPENDICES

APPENDIX A

Rule 28.1 Statement of Petitioners Northeast Bancorp, Inc. and Union Trust Company

Union Trust is a wholly owned subsidiary of Northeast. Northeast has no parent companies, subsidiaries (except wholly owned subsidiaries) or affiliates as those terms are used in Supreme Court Rule 28.1. Union Trust has no subsidiaries (except wholly owned subsidiaries) or affiliates as those terms are used in Supreme Court Rule 28.1.

Rule 28.1 Statement of Petitioner Citicorp

A.I.M. Bankers Nominees Senderian Berhad
Ace Pacific Navigation Co., S.A.
Addis Ababa Bank S.C.
Adela Investment Company S.A.
Administradora De Consorcios Crefisul Ltda.
Aeicor Inc.
AFC Holdings (Malaysia) Sendirian Berhad
Agricultural Finance Corporation Limited
Airship Industries Limited
Alpha Pacific Maritime Co., S.A.
Amicor Incorporated
Apetik-Refeicoes Convenio Ltda.
Argos Companhia De Seguros
Arrendadora Banamex, S.A. De C.V.
Arrendadora Y Administradora Citycol S.A.
Asean Finance Corporation Limited
Asfinco Singapore Ltd.
Asia Pacific Capital Corporation Limited
Asian International Merchant Bankers Berhad
Atena Inc.

Atlas Factoring Services Limited
Atlas Hire Purchase Limited
Atlas Leasing Limited
Aughnacloy Pty. Limited
Austraclear Limited
Automated Clearing Bureau (Pty.) Limited
Avrenim Catering Services Limited
Avrenim Leasing Limited
Baltic Exchange Limited, The
Banco Crefisul De Investimento S.A.
Banco De Desarrollo Del Paraguay S.A.
Banco De Guayaquil
Banco De Honduras S.A.
Banco Hipotecario De La Construccion
Banco Internacional De Colombia (Nassau) Limited
Banco Internacional De Colombia, S.A.
Banco Latinamericano De Exportaciones S.A.
Bancontact
Bangkok First Investment & Trust Limited
Bangkok First Tokai Company Limited
Bangkok Home Development Co.
Bangkok Nomura International Securities Co., Ltd.
Bank of Canton Limited
Banque Grindlay Internationale Au Zaire S.Z.A.R.L.
Banque Populaire De La Cote D'Or
Bard Discount House Limited
Bata Pacific Shipping Corp., S.A.
Bay Forest Lot 20
Birmingham Beagles Limited
Blackheath Cater Estates Limited
Boerum Court Associates
Brandts City Leasing Limited
Brandts France S.A.
Brandts Industrial Assets Limited
Brandts Nominees Limited
Brandts Second Nominees Limited
Brandts Woodpulp International Limited

Brickell Biscayne Associates
Brightfaith Navigation S.A.
Brinmex Trust
British Bank Of Commerce (Securities) Limited
Brother Industries, Ltd.
BT Publications, Inc.
Burr Ridge Club Co., The
Business & Finance Limited
Business Press Of Ireland Limited
Business Properties Limited
Bytex Holdings Limited
Cabinet Antoine Pouget & Cie "Diners Assurances"
Calais Resources Limited
Cambridge Credit Corp.
Caps Holdings Limited
Cardholder Services Limited
Caribbean Financial Services Corporation Limited
Carrigart Pty. Limited
Cedel, S.A.
Central Holdings Corporation
Centralian Holdings Limited
Channel Collections Limited
Chemelil Sugar Company Limited
Chiba General Lease Co., Ltd.
Citi-Reserve, Societe D'Investissement A Capital Variable
Citibank (Zaire) S.A.R.L.
Citibank Espana S.A.
Citibank Factoring Canada Limited
Citibank Leasing Canada Limited
Citibank-Maghreb
Citibelsa S.A.
Citicorp Bill Discounts Limited
Citicorp Capital Markets Australia Limited
Citicorp Chile Agente De Valores S.A.
Citicorp Finance And Securities
Citicorp Forex Limited

Citicorp New Zealand Limited
Citicorp Nominees Pty. Limited
Citicorp Y Rio—Banco De Inversion, S.A.
Citicrefisul S.A.—Sociedade de Investimento
Citifinance Limited
Citisecurities Limited
Citytrust Banking Corporation
Citytrust Realty Corporation
Clive Street Nominees Private Limited
Coho Resources Limited
Combro Limited
Command Studios Limited
Commonwealth Development Finance Company Limited
Commonwealth Oil Refining Company, Inc.
Community Hospitals P.L.C.
Compagnie Franco-American De Gestion Financiere
Companhia Brasileira De Entrepostos E Comercio
Compania Colombiana De Financiamentos Comercial, S.A.
Compania Exportadora Cityexport S.A.
Concord Company
Creation Group Limited
Creation Limited
Creation Printing Limited
Creative Press Limited
Credicard S.A.—Administradora De Cartoes de Credito
Credit Finance Corporation
Creekside Company
Crefidada S.A.—Processamento De Dados
Crefisul—Arrendamento Mercantil S.A.
Crefisul—Corretora De Seguros Ltda.
Crefisul—Previdencia Privada S.A.
Crefisul—Representacoes, Comercio E Participacoes Ltda.
Crefisul Distribuidora De Titulos E Valores
Mobiliarios S.A.
Crefisul Empreendimentos Imobiliarios S.A.
Crefisul S.A.—Credito, Financiamento E Investimento

D.C. The Credit Managing & Marketing Co., Ltd.
Dagnal Shipping Company Inc.
Dai-Fuji General Lease K.K.
Dainippon Ink And Chemicals, Inc.
Daiwa Mortgage Co., Ltd.
Data Type International Limited
Dearborn Park Corporation
Denvermoor Limited
Desarrollo Industrial, S.A.
Development Bank Of Singapore Limited, The
Development Bank Of Zambia, The
Development Finance Corporation Of Ceylon
DHC Corporation
Digital Computer Lease Inc.
Diners Club (N.Z.) Limited
Diners Club (S.A.) (Pty.) Limited
Diners Club Africa (1976) Limited
Diners Club Danmark A.S.
Diners Club De Chile S.A.
Diners Club De France S.A.
Diners Club De Panama, S.A.
Diners Club D'Italia S.P.A., The
Diners Club Du Maroc
Diners Club Israel Limited
Diners Club Limited
Diners Club Limited, The
Diners Club Limited, The (Ireland)
Diners Club Nordic A.S.
Diners Club Of Japan, Inc., The
Diners Club Peru S.A.
Diners Club Portugal S.A.R.L.
Diners Club S.A.L.
Diners Club Sweden A.B.
Diners Voyages S.A.
Diners World Travel Limited
Diners World Travel Ltd.—Greece
Diners World Travel Ltd.—Israel

Diners World Travel Pty. Limited
Dinshopping S.A.
Discor Investments (Private) Limited
Discount Company of Zimbabwe Limited
DNC Agency, Inc.
Dorchester On Rittenhouse Square Partners, The
Doyu Shoji, Inc.
Eagle II
East African Development Bank Limited
Edilistes S.A.R.L.
Efts Service Corporation
Efts Service Corporation II
Elk Grove Village Venture
Elogica Gesellschaft Fur Elektronik In Der Datenubertragung MB.H.
Employment Conditions Abroad Limited
Empresa de Colaboraciones Comerciales, S.A.
Ente Finanziario Interbancario—Efibanca S.P.A.
Eon Corporation
Esquilla Participacoes E Empreendimentos S.A.
Euclid Commercial Joint Venture
Euclid Golf Joint Venture
Eurocard Belgium—Luxembourg S.A.
Eurocard International Kreditkarten—Organization GMBH
Europa Fund Limited
Export Credit Insurance Corporation Of Singapore Pte. Ltd.
Export Finance Corporation Of Canada Ltd.
F. G. L. Service Co., Ltd.
Famibank S.A.
Ferore No. 1 Pty. Limited
Fil—Insure Brokers, Inc.
Finance Houses Association Of Zimbabwe (Private) Limited, The
Financiaciones Industriales Incredit, S.A.
Financial Reserve, Incorporated

Financia Nederland N.V.
Financiera Citicorp S.A.
Finanziaria Industriale Fin. Ind. S.P.A.
Finders Limited
First Citicorp Leasing, Inc.
First Hemphill
First National Nippon Shinpan Co., Ltd.
Fleet (1960) Limited
Flores Tankers Ltd.
Fluidic Industries, Inc.
Ford Lio Ho Motors Co., Ltd.
Forest Creek Venture
Franklin Medical Limited
Friendship Heights Associates
FRMC Corporation
Fuji National City Consulting, Inc.
Fujigin Factors, Ltd.
Fuyo (Panama) S.A.
Fuyo General Lease Co. Ltd.
Fuyo Lease Company Ltd.
Gable Construction (Surrey) Limited
Gable Construction Holdings Limited
Gamma Pacific Maritime Co., S.A.
Garfield Restoration, The
Getan Limited
Giftworld Holdings Limited
Gillespie (Trade Finance) Pty. Limited
Gillespie Bros. (Holdings) Limited
Gillespie Bros. & Company (Oversea) Limited
Gillespie Bros. & Company Limited
Gillespie Bros. U.S.A. Inc.
Gladding Corporation
Glenlui Investments Limited
Global Ocean Co., Ltd.
Grand Yamagata Lease Co., Ltd.
Great Eastern Co-Operative Housing Society Limited
Greater Southwest Community Service Corp.

Grindinvest S.A
Grindlay Brandts A.G.
Grindlay Brandts Clark Marine Limited
Grindlay Brandts Executor & Trustee Company Limited
Grindlay Brandts Export Finance Limited
Grindlay Brandts GMBH
Grindlay Brandts Industrial Finance Limited
Grindlay Brandts Limited
Grindlay Henderson Management Limited
Grindlays (No. 1) Investments
Grindlays (No. 2) Investments
Grindlays (No. 3) Investments
Grindlays (No. 4) Investments
Grindlays (No. 5) Investments
Grindlays (No. 6) Investments
Grindlays (No. 7) Investments
Grindlays (No. 8) Investments
Grindlays (No. 9) Investments
Grindlays (No. 10) Investments
Grindlays Asia Limited
Grindlays Asia Pacific Holdings Limited
Grindlays Asia Pacific Management Services Limited
Grindlays Australia Limited
Grindlays Bahrain Bank B.S.C.
Grindlays Bank (Jersey) Limited
Grindlays Bank (Overseas Management) Limited
Grindlays Bank (Uganda) Limited
Grindlays Bank International (Kenya) Limited
Grindlays Bank International (Uganda) Limited
Grindlays Bank International (Zambia) Limited
Grindlays Bank Nominees (Jersey) Limited
Grindlays Bank of Canada
Grindlays Bank P.L.C.
Grindlays Bank S.A.
Grindlays Company Limited
Grindlays Equipment Finance Limited
Grindlays Eurofinance B.V.

Grindlays Executor & Trust Company (Private) Limited
Grindlays Export Finance A.G.
Grindlays Finance Corporation Limited
Grindlays Futures Limited
Grindlays Holdings P.L.C.
Grindlays Humberclyde Limited
Grindlays Industrial And Commercial Finance Limited
Grindlays Industrial Finance Limited
Grindlays Industrial Holdings Limited
Grindlays Industrial Leasing Limited
Grindlays International Finance (Kenya) Limited
Grindlays International Limited
Grindlays Leasing Limited
Grindlays Leasing Of Zambia Limited
Grindlays Merchant Bank Of Nigeria Limited
Grindlays Nominees (Kenya) Limited
Grindlays Nominees (Pakistan) Limited
Grindlays Nominees (Private) Limited
Grindlays Nominees (Zambia) Limited
Grindlays Participacoes E Servicos Limitada
Grindlays Scotland (Executor & Trustee) Limited
Grindlays Securities Australia Limited
Grindlays Securities Limited
Grindlays Trust Limited
Groupe D'Etudes Techniques Et Commerciales S.A.R.L.
Growth Realty Companies
H.J. Mugdan Limited
Harare Board Of Executors (Private) Limited
Harrison Credit Group, Inc.
HCG Services, Inc.
Hellenic Investment Company, S.A.
HGL Leasing Inc.
Higo General Lease K.K.
Hokuetsu Leasing Co., Ltd., The
Hotel Regina S.A.
Humberclyde Assets Limited
Humberclyde Finance Limited

Humberclyde Leasing Limited
Humberclyde Livestock Limited
Hyster Company
I.S.C., Inc.
Indian Explosives Limited
Industrial Credit And Investment Corporation Of India Limited, The
Industrial Development Corporation Of Zimbabwe Limited
Industrial Finance Corporation Of Thailand
Industrialization Fund Of Finland
Information Technology Limited
Inmobiliaria Jienense, S.A.
Insmore Holdings Ltd.
Interlaken
Investment Corporation Of Bangladesh
Investment Corporation Of Pakistan
Investment Holdings Limited
Investments and Property Holdings Limited
Investors' Finance Corporation
Ipcorn Limited
Isis Industrial Services P.L.C.
Island Finance Corporation
Istituto Central D. Banche E Banchieri
J. Collett Limited
J.J. Finance Pty. Ltd.
J.N. Travers & Co. Limited
Japan Dental Loan Service, Ltd.
Jupiter Navigation Company S.A.
Kao Corporation
Kingsbrooke Co.
KKB Bank KGAA
Konishiroku Photo Industry Co., Ltd.
Korea Long Term Credit Bank
KSV Kreditschutz—Vereinigung GMBH
Kuala Lumpur Clearing House Sendirian Berhad
Kurapa Services (Pvt.) Limited
Lake Terrace Associates

Lampasas, Inc.
Land Trust #5018
Lease Contracts P.L.C.
Lensfield Products Limited
Lerlaw Investments Pty. Limited
Lexington Commons, The
Lexington Village, The
Liberian Bank For Industrial Development and Investment
Lifetime Communities, Inc.
Liquiditats—Konsortialbank GMBH
Llewellyn Sanders (Investissements) S.A.R.L.
London Rubber Exchange Company Limited
Long Term Credit Bank Of Japany, Ltd., The
MacBlast (Scotland) Limited
Maghreb Finance S.A.
Mainstay Computer Cover Limited
Malcha Properties Limited
Mangers Holdings Limited
Marcade Group, Inc.
Marine Partners
MBC Financial Services Corporation
MBC Mortgage Corporation
MBC Realty Corporation
Mercantile Bank Of Canada International N.V., The
Mercantile Bank Of Canada, The
Mercantile Canada Finance B.V.
Merchant Bank (Ghana) Limited
Meridian Partnership Ltd.
Merlin Limited
Minbanc Capital Corporation
Minerva Leasing Limited
Minerva Nominees Limited
Minerva Nominees Scotland Limited
Mission Park Corporation
Mistry Manor Co-Operative Housing Society Limited
Mitsui Trust & Banking Co., Ltd., The

Mittelrheinische Grundstucksverwaltung—Und Vermittlungsgesellschaft Dr. Horbach & Co. KG
Multi Marketing Limited
National And Grindlays Bank & Trust Company Limited
National And Grindlays Bank Limited
National and Grindlays Nominees Limited
National Bank Of India Limited
National Corporation For Housing Partnerships
National Discount Corporation Limited
National Finance And Investments SAL
National Housing Partnership, The
National Stockbrokers Limited
Nationwide Industries, Inc.
Network EFT, Inc.
New England Village, The
New Town Commons
Nigeria International Bank, Limited
Nomisma-Societa Di Studi Economici S.P.A.
Norper Investments Pty. Ltd.
Northern Development (Holdings) Limited
Northstar Home Theatre, Inc.
Norwood Subdivision
Oak Forest Company
Olive Trees Venture
Oman Development Bank S.A.O.
Omnicenter S.A.
One Sansome Street Associates Inc.
Opalton Ltd.
Organization D'Information Et De Securite Pour Le Credit S.A.R.L.
Orient Pacific Capital Investment Corporation
Orland Company
Overseas Bankers Club Limited
P.T. Citicorp Leasing Indonesia
P&F Industries, Inc.
Paddle Creek Enterprises, Inc.
Paddle Creek Joint Venture

Pakistan Industrial Credit And Investment Corporation Limited
Pargola (Shipping) Limited
Park City Partners
Park Plaza Investment
Park West Construction Company
Parking Du Pont Du Mont Blanc S.A.
Parliament Street Nominees Limited
Pars Paper Company Limited
Partridge Hill Company
Peer Services, Inc.
Petroquimica Uniao, S.A.
Philippine Clearing House
Pioneer Atlantic Navigation Co., S.A.
Place Mercantile
Pleasantdale Realty Corporation
Poco Petroleums Limited
Polish Timber Products Limited
Politbutenos Argentinos S.A.
PPLA Plaza, Limited Partnership
Premier Mills Limited
Private Export Funding Corporation
Private Investment Company For Asia
Purcoil (One) Limited
Purcoil (Two) Limited
Ready Credit Limited
Realesco Equities Corp.
Refractarios Lota Green S.A.
Revue Signature S.A.R.L.
RIBA—Representacoes Participacoes E Administracao Ltda.
Rinona Pty. Limited
Rob Roy Country Club Village
Rose Leaf Navigation Co., S.A.
Rose Root Navigation Co., Ltd.
Rose Wood Navigation Co., S.A.
Rosignol Development Corporation

Roxy Petroleum Ltd.
S.I. Quay Du Mont Blanc 7
S.N.—Crefisul S.A.—Distribuidora De Titulos
E Valores Mobiliarios
S.N.—Crefisul S.A.—Sociedade Corretora
S.P.O. Minerals Co. Limited
Sagar Sangeet Co-Operative Housing Society Limited
Sam C. Thomson (Timber) Company Limited
Saudi American Bank
Savings & Loan Network, Inc., The
Schufa Aachen—Schutzgemeinschaft Fur
Allgemeine Kreditsicherung GMBH
Schufa Bremen/Weser-EMS-Schutzgemeinschaft Fur
Allgemeine Kreditsicherung GMBH
Schufa Duesseldorf—Schutzgemeinschaft Fur
Allgemeine Kreditsicherung GMBH
Schufa Hamburg—Schutzgemeinschaft Fur
Allgemeine Kreditsicherung GMBH
Schufa Koln—Schutzgemeinschaft Fur
Allgemeine Kreditsicherung GMBH
Schufa Mannheim—Schutzgemeinschaft Fur
Allgemeine Kreditsicherung GMBH
Schufa Munchen—Bayerische—Schutzgemeinschaft Fur
Allgemeine Kreditsicherung GMBH
Schufa Niederrheinisch—Westfalische—
Schutzgemeinschaft Fur
Allgemeine Kreditsicherung GMBH
Schufa Ostwestfalen—Lippe—Schutzgemeinschaft Fur
Allgemeine Kreditsicherung GMBH
Schufa Stuttgart—Schutzgemeinschaft Fur
Allgemeine Kreditsicherung GMBH
Schuyler Associates
SCI Bernard Palissy Limoges
SCI Cap Tayat
SCI Cassis Rouet Borde
SCI Clement Michut
SCI Crequi Prevost

SCI Creteil Front Du Lac T.2
SCI Creteil Front Du Lac T.3
SCI De L'Armande
SCI De L'Avenue Berger
SCI De L'Opera
SCI De Zenon
SCI Des Et Financiers
SCI Dolce Farniente
SCI Du Bel Air
SCI Du Bois De Norges
SCI Du Chateau
SCI Du Docteur Cauvin
SCI Evry Bras De Fer
SCI Font De L'Ange
SCI Guyot Walter
SCI Hotel Williams
SCI Jules Noriac
SCI La Clairefontaine
SCI La Cravache
SCI La Huniere
SCI La Margelle
SCI La Martine
SCI La Paloma
SCI La Robertson
SCI La Sourdiere
SCI Lacordaire
SCI Le Bois D'Eragny Montigny Le Bretonneux
SCI Le Campanile
SCI Le Cezanne
SCI Le Coriolan
SCI Le Coriolan 1
SCI Le Coudray Chenet
SCI Le Elos De Lentilly
SCI Le France
SCI Le Madrepore
SCI Le Meridien
SCI Le Poseidon

SCI Le Verger
SCI Les Almadies
SCI Les Alpes Riquier
SCI Les Alpilles
SCI Les Balcons D'Entremont
SCI Les Floralies
SCI Les Gradines
SCI Les Hameaux Des Logissons
SCI Les Hauts De Bonneveine
SCI Les Jardins Le Mont Fleury
SCI Les Mas De La Mer
SCI Les Muses De Vence
SCI Les Olivers
SCI Les Palmiers 1
SCI Les Palmiers 2
SCI Les Palmiers 3
SCI Les Strelizias
SCI Les Trois Tours
SCI L'Esterel
SCI L'Hameau Du Parc
SCI Llewellyn Sanders
SCI Maccarani Buffa
SCI Marne Torcy No. 1
SCI Marne Torcy No. 2
SCI Marne Torcy No. 3
SCI Mire Juan
SCI Moissy Senart 1
SCI Moissy Senart 2
SCI Nice Fabron
SCI Orteaux Vignolles
SCI Parc Des Bruyere
SCI Parking Meyerbeer
SCI Pierre Brunier
SCI Quai De Valmy
SCI Residence De La Croix Du Sud
SCI Residence De L'Etoile Castellane
SCI Residence Du Parc A Groslay

SCI Residence La Simiane
SCI Residence Saint Germain
SCI Rue De L'Elysee
SCI Rue Des Abondances A Boulogne
SCI Rue La Bruyere, J. Lemercier
SCI Rueil Michelet
SCI Super Valmont Redon 2
SCI Trou Du Grillon 1
SCI Trou Du Grillon 2
SCI Val Romain
SCI Versailles Saint Antoine
SCI Villa Atalante
SCI Villiers De L'Aizement
SCI 127 Boulevard Serrurier
SCI 14 Rue Jean Edeline
SCI 15 Rue Pierre Brunier
SCI 17 Rue De Berri
SCI 24-28 Avenue De La Gare
SCI 3-5 Residence Saint Guillaume
SCI 314-330 Avenue Du Prado
SCI 38 Raymond Poincare
SCI 38 Route D'Aulnay
SCI 50-60 Rue Botzaris
SCI 57-59 Rue Des Tilleuls Boulogne
SCI 60 Boulevard De Cimiez
Scottish Timber Products Limited
SED Systems Limited
Senews Limited
Servicios Turisticos Plaza
Shikoku General Lease K.K.
Shinyo Hosho Service Inc.
Showa Financing KK
Sibes Participation En Capital
Sita World Travel (London) Limited
SMB Computers Limited
SNC Parking Du Terrace
Snow Goose Compania Naviera S.A.

Sociedad De Financiacion De Vendas A Credito, S.A.
Societe Anonyme D'Economie Mixte Marignanne
Societe Anonyme Vitrollaise D'Economie Mixte
Societe de Realisation Fonciere et Immobiliere
Societe D'Etude De Centralisation Industrielle Et Da Renovation Urbainne
Societe D'Etude Pour L'Implanation D'Un Centre Mediterranean Pour Le Commerceinternational
Societe Financiere Interprofessionelle D'Entreposage
Societe Interprofessionnelle Pour La Compensation Des Valeurs Immobilieres
Society For Worldwide Interbank Financial Telecommunications S.C.
Sord Computer Systems, Inc.
South American Placers Inc.
Southeastern Holding Company, Ltd.
Southern Syndicate, Inc.
Spar-Und Kreditbank Wien-Reg. Gen. MBH
Spectrum Itex Limited
Sperry New Holland Credit Corporation
Spey Developments Limited
Spey Industrials Limited
Spey Investments Limited
Spey Nominees Limited
Spey Securities Limited
St. Michaels Venture
Straits Oil And Gas Limited
Sul Brasileiro S.A.—Administradora De Cartao De Credito
Sulina—Participacoes E Servicos Ltda.
Sun Lotus Navigation Co., S.A.
Syarikat Export Credit Guarantee Berhad
Tableros Guillermina S.A.
Taiwan First Investment & Trust Co., Ltd.
Tamashin Lease Co., Ltd.
Tarjetas De Credito De El Salvador, S.A.
Tarjetas De Credito De Guatemala, S.A.
Tarjetas De Credito, S.A.

Tarjetas Y Servicios, S.A.
Techcom Australia Pty. Limited
Templar Finance Co. Limited
Tokai Seiki Co., Ltd.
Tokyo Mortgage Acceptance Corporation
Torian Plum Venture
Transleasing, S.A.
Trappeur's Crossing
Trinfinance Ltd.
Tundoors Pty. Limited
Tupuna Pty. Limited
Tupuna Unit Trust, The
Tuticorin Chamber of Commerce
Union Property And Assets (Holdings) Limited
Union Property And Assets Company Limited, The
Vastra Sveriges Traproducenter A.B.
Veda Credit & Travel Service Ltd.
Verlag Fur Absatzwirtschaft GMBH
Vickers Da Costa Finance Limited
Vickers Da Costa (Holdings), Inc.
Village Properties Company
Visayan Integrated Steel Corporation
Vitatron N.V.
Von Seidel Grindlays Trust Company Limited
Von Seidel Nominees (Private) Limited
Walwyn Inc.
Wang Lee Bank, Limited, The
Wardby Limited
Wellrack Properties Limited
West Indian Development Company Limited
Western Trails Venture
Willcox & Gibbs, Inc.
Willings International (Sales) Limited
Wiltminster Limited
Winterpoint II Joint Venture
Wm. Brandts (Australia) Pty. Limited

Wm. Brandts (Hardwood) Limited
Wm. Brandts (Timber) Limited
Wm. Brandts (Wallply) Limited
Wm. Brandt's Sons & Company Limited
Wold P.L.C.
Woodglen Venture
Woods Inc.
Xenotron Limited
Zimbabwe Credit Insurance Corporation Limited
106487 Canada Inc.
400 East Ohio Limited Partnership
540 Company
808 Broadway Associates
1099 Associates

APPENDIX B

Opinion of the United States Court of Appeals for the Second Circuit (August 1, 1984) (—— F.2d ——)

Nos. 1378, 1379, 1380—August Term, 1983

(Argued May 14, 1984 Decided August 1, 1984)

Docket Nos. 84-4047, 84-4051, 84-4053, 84-4081

NORTHEAST BANCORP, INC. and UNION TRUST COMPANY,
Petitioners-Appellants,

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
Respondent-Appellee.

CITICORP, a Corporation,
Petitioner,

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
Respondent.

BEFORE:

CARDAMONE and PRATT, *Circuit Judges,*
and BONSAL, *District Judge.**

Appeal from orders of the Federal Reserve Board approving mergers pursuant to Sections 3 and 4(c)(8) of the Bank Holding Company Act of 1956.

Affirmed.

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* Of the Southern District of New York, sitting by designation.

BONSAL, *District Judge:*

Petitioners Citicorp ("Citicorp"), Northeast Bancorp, Inc. together with Northeast's subsidiary bank, Union Trust Company (collectively "Northeast"), and intervenor Bank of Boston Corporation ("BBC") petition this court to review three orders of the Board of Governors of the Federal Reserve System (the "Board") which, pursuant to Sections 3 and 4(c)(8) of the Bank Holding Company Act of 1956 (the "BHCA"), approved the applications of:

1) Bank of New England Corporation ("BNE"), a Massachusetts bank holding company, to acquire CBT Corporation ("CBT"), a Connecticut bank holding company;

2) Hartford National Corporation ("HNC"), a Connecticut bank holding company, to acquire Arltru Bancorporation ("Arltru"), a Massachusetts bank holding company; and

3) Bank of Boston Corporation ("BBC"), a Massachusetts bank holding company, to acquire Colonial Bancorp, Inc. ("Colonial"), a Connecticut bank holding company.

In enacting the BHCA, Congress established a framework for the supervision and regulation of bank holding companies, i.e., companies that control one or more banks.[1] Section 3 of the BHCA prohibits any acquisition of a bank by a bank holding company without prior approval of the Board. Section 4 of the BHCA allows bank holding companies, through "non-bank" subsidiaries, to provide finan-

1. 12 U.S.C. § 1841 (c) defines a "bank," in relevant part, as an "institution . . . which (1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans."

cial services which the Board deems to be "so closely related to banking or managing or controlling banks as to be a proper incident thereto." 12 U.S.C. § 1843(c)(8).[2]

The BHCA, as originally passed by the House of Representatives, banned interstate acquisitions. *See* H.R. Rep. No. 609, 84th Cong., 1st Sess. 3, 15 (1955). The original version of the bill reported out by the Senate Committee contained no provision dealing with interstate acquisitions. *See* S. Rep. No. 1095, 84th Cong., 1st Sess. 10-11 (1955). However, Senator Douglas of Illinois proposed an amendment in the Senate which was adopted by both Houses as Section 3(d) of the BHCA (the Douglas Amendment). The Douglas Amendment provided that no application by a bank holding company to acquire a bank located in another state could be approved by the Board unless the state in which such bank was located had, by statute, specifically authorized such acquisition.[3]

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2. Bank holding companies are generally prohibited from owning stock in companies other than banks.

3. Section 3(d) of the BHCA, 12 U.S.C. § 1842(d) (the Douglas Amendment) provides:

> *Limitation by State boundaries.* Notwithstanding any other provision of this section, no application (except an application filed as a result of a transaction authorized under section 13(f) of the Federal Deposit Insurance Act [12 U.S.C. § 1823 (f)]) shall be approved under this section which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank located outside of State in which the operations of such bank holding company's banking subsidiaries were principally conducted on July 1, 1966, or the date on which such company became a bank holding company, whichever is later, *unless the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication.* For the purposes of this section, the State in which the operations of a bank holding company's subsidiaries are principally conducted is that State in which total deposits of all such banking subsidiaries are largest. (Emphasis added.)

Massachusetts, in 1982, and Connecticut, in 1983, enacted statutes (hereinafter referred to as the Massachusetts and Connecticut statutes, respectively) to permit interstate bank acquisitions. The Massachusetts statute authorized bank holding companies located in any other New England state to acquire banks located in Massachusetts, provided that the New England state in which such bank holding company was located had granted reciprocal privileges to bank holding companies located in Massachusetts. The Connecticut statute contained a similar provision.[4]

(1) *THE BNE APPLICATION*

On July 11, 1983 BNE entered into an agreement to acquire CBT under the authority of the Connecticut statute. On August 5, 1983, pursuant to Sections 3 and 4(c)(8) of the BHCA, BNE applied to the Board for approval of its proposed acquisition of CBT. By notice published in the *Federal Register* dated September 15, 1983, the Board invited comment on BNE's application.[5] Citicorp and Northeast opposed the application and asked the Board to defer action pending the outcome of litigation Northeast had instituted challenging the constitutionality of the Connecticut statute, which litigation was dismissed on December 16, 1983.[6] On March 26, 1984 the Board approved BNE's pro-

4. Mass. Gen. Laws Ann. ch.167 A, § 2 (West Supp. 1982); 1983 Conn. Act 83-411 (Reg. Sess.). Rhode Island has enacted a similar statute, effective July 1, 1984, which is limited to New England acquisitions for two years after its effective date. R.I. Gen. Laws §§ 19-30-1, 19-30-2 (1984).

5. Application Notice, 48 Fed. Reg. 41,524 (1983).

6. On July 29, 1983 Northeast filed an action in the U.S. District Court in Connecticut against the Connecticut Banking Commissioner. On December 16, 1983 Northeast's complaint was dismissed on the ground that Northeast lacked standing to challenge the constitutionality of the Connecticut statute. *Northeast Bancorp, Inc.* v. *Woolf*, 576 F. Supp. 1225 (D. Conn. 1983), *aff'd mem.*, No. 84-7003 (2d Cir. April 25, 1984).

posed acquisition of CBT pursuant to Sections 3 and 4(c)(8) of the BHCA.[7] The Board found that the acquisition came within the Douglas Amendment because it had been specifically authorized by the Connecticut statute. The Board found that "the Douglas Amendment should be read as a renunciation of federal interest in regulating the interstate acquisition of banks by bank holding companies." The Board also found no "clear and unequivocal" basis for finding the Connecticut statute unconstitutional.

(2) *THE HNC APPLICATION*

On September 1, 1983 HNC entered into an agreement to acquire Arltru under the authority of the Massachusetts statute. On October 19, 1983, pursuant to Section 3 of the BHCA, HNC applied to the Board for approval of its proposed acquisition of Arltru. By notice published in the *Federal Register* dated November 25, 1983, the Board invited comment.[8] By letter dated December 16, 1983 and attachments, Citicorp opposed HNC's application. On March 26, 1984 the Board approved HNC's proposed acquisition of Arltru pursuant to Section 3 of the BHCA.[9] The Board found that the acquisition came within the Douglas Amendment because it had been specifically authorized by the Massachusetts statute. The Board found that "the Douglas Amendment should be read as a renunciation of federal interest in regulating the interstate acquisition of banks by bank holding companies." The Board also found no "clear and unequivocal" basis for finding the Massachusetts statute unconstitutional.

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7. *Bank of New England Corporation*, 70 Fed. Res. Bull. 374 (1984).

8. Application Notice, 48 Fed. Reg. 53,172 (1983).

9. *Hartford National Corporation*, 70 Fed. Res. Bull. 353 (1984).

(3) *THE BBC APPLICATION*

BBC entered into an agreement to acquire Colonial under the authority of the Connecticut statute, and pursuant to Sections 3 and 4(c)(8) of the BHCA BBC applied to the Board for approval of its proposed acquisition of Colonial. By notice published in the *Federal Register* dated February 16, 1984, the Board invited comment on BBC's application.[10] On March 8, 1984 Citicorp filed comments with the Board opposing the application. On May 18, 1984 the Board approved BBC's proposed acquisition of Colonial pursuant to Sections 3 and 4(c)(8) of the BHCA.[11] On the basis of the Board's findings with respect to the applications of BNE and HNC, the Board refused to find the Connecticut statute unconstitutional, and so approved BBC's application.

Pursuant to Section 9 of the BHCA, Citicorp and Northeast filed with this court petitions for review of the orders of the Board approving the BNE-CBT and HNC-Arltru acquisitions.[12] The petitions were consolidated and the acquisitions stayed pending review by this court of the orders of the Board. BNE, CBT, HNC, the State of Connecticut and the Commonwealth of Massachusetts were permitted to intervene. Thereafter, on May 25, 1984, pursuant to Fed. R. App. P. 15(d), BBC moved for leave to intervene, which motion was granted by this court on June 18, 1984. BBC also moved to consolidate for decision the petition for review filed in its action with the petitions

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10. Application Notice, 49 Fed. Reg. 6012 (1984).

11. *Bank of Boston Corporation*, 70 Fed. Res. Bull. 524 (1984).

12. Section 9 of the BHCA (12 U.S.C. § 1848) provides that any party aggrieved by an order of the Board may petition for a review of the order in the United States Court of Appeals and that the Court shall have jurisdiction to affirm, set aside, or modify the Board's order.

pending before the court. This motion was also granted by this court on June 18, 1984.

DISCUSSION

Petitioners Citicorp and Northeast contend that the Board erred in approving the applications of BNE, HNC, and BBC because the Massachusetts and Connecticut statutes, by limiting interstate acquisitions of Massachusetts and Connecticut banks to bank holding companies located in other New England states, impermissibly restrict interstate commerce in violation of the Commerce Clause. Petitioners argue that since the Massachusetts and Connecticut statutes violate the Commerce Clause, they are unconstitutional, and the Douglas Amendment did not permit the Board to approve the applications. Petitioners also contend that the Massachusetts and Connecticut statutes are part of an interstate understanding which violates the Compact Clause. They charge that by discriminating against non-New England bank holding companies, the statutes also violate the Equal Protection Clause.

The intervenors, on the other hand, contend that the Massachusetts and Connecticut statutes promote interstate commerce and do not violate the Commerce Clause. The intervenors argue that even if the statutes restrict interstate commerce, they do not violate the Commerce Clause since they were enacted under the authority of the Douglas Amendment. The intervenors say that the Massachusetts and Connecticut statutes do not represent an interstate agreement or compact in violation of the Compact Clause; and finally, the intervenors argue that the statutes do not violate the Equal Protection Clause.

The contentions of the parties make it necessary for us to first consider the origin and scope of the Douglas Amendment.

THE DOUGLAS AMENDMENT

As previously stated, the BHCA, as originally passed by the House of Representatives, banned all interstate acquisitions. However, Senator Douglas of Illinois proposed the Douglas Amendment in the Senate and it was adopted by both Houses as Section 3(d) of the BHCA. The Douglas Amendment provided that no application by a bank holding company to acquire a bank located in another state could be approved by the Board unless the state in which such bank was located had specifically authorized such acquisition by statute.[13] In describing his proposed amendment, Senator Douglas stated:

> What our amendment aims to do is to carry over into the field of holding companies the same provisions which already apply for branch banking under the McFadden Act—namely, our amendment will permit out-of-State holding companies to acquire banks in other States only to the degree that State laws expressly permit them . . . .
>
> 102 Cong. Rec. 6858 (1956).

At the time the Douglas Amendment was enacted, no state permitted interstate acquisitions by bank holding companies. Therefore, Senator Douglas observed that the immediate effect of the amendment would be "to bar the expansion of bank holding companies across State lines." 102 Cong. Rec. at 6860. "But," he added, "the amendment would leave the way open for States to make explicit

13. Section 3(a) of the BHCA allows the Board to approve the acquisition of both banks and bank holding companies.

provision for such purchases and acquisitions if they so decided." *Id.*

The Board, after reviewing its legislative history, found the Douglas Amendment to be a "renunciation of federal interest in regulating the interstate acquisitions of banks by bank holding companies." As recently pointed out by the Supreme Court in *Securities Industry Association v. Board of Governors of the Federal Reserve System,* —— U.S. —— (1984), "[t]he Board is the agency responsible for federal regulation of the national banking system, and its interpretation of a federal banking statute is entitled to substantial deference."

The Douglas Amendment prohibits the Board from approving applications by bank holding companies to acquire banks located in other states unless the state in which the bank is located has enacted a statute "specifically authorizing" such acquisitions. The Massachusetts and Connecticut statutes specifically authorize acquisitions of Massachusetts and Connecticut banks by bank holding companies located in other New England states. Without these statutes no out-of-state bank holding companies could acquire Massachusetts or Connecticut banks. Therefore, in permitting interstate acquisitions (albeit limited to New England), the Massachusetts and Connecticut statutes would appear to promote interstate commerce rather than restrict it.

We have considered the argument that the Massachusetts and Connecticut statutes, to avoid conflicting with federal law, must either permit all bank holding companies throughout the United States to acquire their banks or permit none. However, we find nothing in the language or history of the Douglas Amendment which supports this contention. *See Iowa Independent Bankers v. Board of*

Governors of the Federal Reserve System, 511 F.2d 1288, 1296-97 (D.C. Cir.), *cert. denied,* 423 U.S. 875 (1975). Indeed, Section 7 of the BHCA reserves to the states the power and jurisdiction they possessed before the BHCA was enacted.[14]

COMMERCE CLAUSE

The Commerce Clause grants to Congress the power "[t]o regulate Commerce . . . among the several States . . . ." U.S. Const., Art. I, § 8, cl. 3. Congress, of course, may regulate commerce among the states as it sees fit. *Western & Southern Life Insurance Co. v. State Board of Equalization,* 451 U.S. 648, 652 (1981); *Prudential Insurance Co. v. Benjamin,* 328 U.S. 408, 434 (1946). The Commerce Clause has been interpreted to limit the power of the states to interfere with or impose burdens on interstate commerce. *Western & Southern Life Insurance Co.,* 451 U.S. at 652; *Lewis v. BT Investment Managers, Inc.,* 447 U.S. 27, 35-36 (1980); *Great Atlantic & Pacific Tea Co. v. Cottrell,* 424 U.S. 366, 370-71 (1976). However, if Congress authorizes the states to regulate some aspect of interstate commerce, any action taken by a state within that authority is "invulnerable" to challenge. *Western & Southern Life Insurance Co.,* 451 U.S. at 652-53. Moreover, Congress may authorize the states to enact statutes which may interfere with interstate commerce. Such statutes do not violate the Commerce Clause. *White v. Massachusetts Council of Construction Employers,* 460 U.S. 204 (1983). However, congressional authorization must be clear. *South Central*

14. Section 7 of the BHCA (12 U.S.C. § 1846) provides:

Reservation of rights to States. The enactment by the Congress of this chapter shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof.

Timber Development, Inc. v. Wunnicke, —— U.S. —— (1984); *White,* 460 U.S. at ——(1983); *Western & Southern Life Insurance Co.,* 451 U.S. at 653-54. We believe that, by enacting the Douglas Amendment, Congress authorized Massachusetts and Connecticut to enact the statutes challenged here.

For the reasons above stated, we conclude that the Massachusetts and Connecticut statutes do not violate the Commerce Clause. Therefore, the Board, in approving the acquisitions, properly concluded that there was no such violation.

COMPACT CLAUSE

The Compact Clause of the Constitution provides that "[n]o State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State, or with a foreign Power . . . ." U.S. Const., Art. I, § 10, cl. 3.

Petitioners contend that the Board's approval of the BNE-CBT, HNC-Arltru, and BBC-Colonial acquisitions should be reversed because the Massachusetts and Connecticut statutes which authorized them were enacted pursuant to an interstate compact to establish a regional banking system in the New England area. Such a compact, say petitioners, violates the Compact Clause.

In addition to the statutes enacted by Massachusetts and Connecticut, Rhode Island has enacted a statute which also limits acquisition of its banks to bank holding companies located in other New England states. However, the Rhode Island limitation will expire two years after the statute's effective date of July 1, 1984. Maine, by statute, permits the acquisition of Maine banks by out-of-state bank holding

companies without limitation.[15] Vermont and New Hampshire do not have bank holding company statutes.

In view of the similarities in the Massachusetts and Connecticut statutes and the limitation to New England bank holding companies, the statutes could be considered as part of a plan or compact to create a regional banking system. Indeed, after considering the legislative history of the Massachusetts and Connecticut statutes and the fact that they were enacted within a six-month period, the Board found that the statutes indicated a plan to create a regional banking system in New England. However, such a plan, even if treated as a compact, would only violate the Compact Clause if it were a "combination tending to the increase of political power in the States, which may encroach upon or interfere with the supremacy of the United States." *United States Steel Corp. v. Multistate Tax Commission,* 434 U.S. 452, 471 (1978) (quoting *Virginia v. Tennessee,* 148 U.S. 503, 519 (1893)); *New Hampshire v. Maine,* 426 U.S. 363, 369 (1976).

As a practical matter, we do not think that a New England bank holding company system would in any way increase the political power of the New England states or encroach upon or interfere with the just supremacy of the United States. However, if at any time Congress should find any encroachment, it could remove the encroachment by appropriate legislation.

EQUAL PROTECTION CLAUSE

Petitioners argued before the Board that the Massachusetts and Connecticut statutes were unconstitutional in violation of the Equal Protection Clause of the Fourteenth Amendment. The Equal Protection Clause provides: "No State shall . . . deny to any person within its

15. Me. Pub. Law 1983, ch. 302, § 2, as amended (1984).

jurisdiction the equal protection of the laws." U.S. Const., Amend. XIV, § 1. Petitioners contend that by only allowing New England bank holding companies to acquire Massachusetts and Connecticut banks, the Massachusetts and Connecticut statutes discriminate against non-New England bank holding companies in violation of the Equal Protection Clause.

This type of legislation violates the Equal Protection Clause only if "the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational." *Barry v. Barchi*, 443 U.S. 55, 67 (1979) (quoting *Vance v. Bradley*, 440 U.S. 93, 97 (1979)). We do not believe that the Massachusetts and Connecticut statutes evidence such irrationality. Rather, because "banking and related financial activities are of profound local concern," *Lewis*, 447 U.S. at 38, the Massachusetts and Connecticut statutes appear to be designed to foster banking and related activities in those states and in neighboring New England states. Massachusetts and Connecticut may be concerned that their banks could be dominated by large bank holding companies located in New York or Chicago if such holding companies were allowed to acquire their banks.[16] Therefore, we find no violation of the Equal Protection Clause. *See generally Iowa Independent Bankers*, 511 F.2d at 1294-96.

In view of the foregoing, we affirm the orders of the Board approving the applications of BNE, HNC, and BBC.

AFFIRMED.

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16. According to statistics published by the Association of Bank Holding Companies, each of the four largest New York bank holding companies has greater assets than those of all the New England bank holding companies combined. Association of Bank Holding Companies, *Bank Holding Company Facts* (Spring 1983 ed.).

APPENDIX C

Order of the Board of Governors of the Federal Reserve System Approving the Application of Bank of New England Corporation to Merge with CBT Corporation (March 26, 1984)

FEDERAL RESERVE SYSTEM

Bank of New England Corporation
Boston, Massachusetts

Order Approving Merger of Bank Holding Companies and Acquisition of Companies Engaged in Commercial Finance, Leasing, Real Estate Lending, Factoring and General Trust Company Activities

Bank of New England Corporation, Boston, Massachusetts ("BNE"), a bank holding company within the meaning of the Bank Holding Company Act of 1956, as amended (12 U.S.C. § 1841 *et seq.*) ("BHC Act"), has applied for the Board's approval under section 3(a)(5) of the Act (12 U.S.C. § 1842(a)(5)), to merge with CBT Corporation, Hartford, Connecticut ("CBT"), also a bank holding company, and thereby to acquire indirectly The Connecticut Bank and Trust Company, N.A., Hartford, Connecticut. In addition, BNE has applied for the Board's approval under section 4(c)(8) of the Act (12 U.S.C. § 1843(c)(8)) and section 225.23(a)(2) of the Board's Regulation Y (12 U.S.C. § 225.23(a)(2)) to acquire CBT's nonbanking subsidiaries: CBT Trust Company of Florida, N.A., West Palm Beach, Florida ("CBT Trust"); Lazere Financial Corporation, New York, New York ("Lazere"); CBT Business Credit Corporation, Hartford, Connecticut ("BCC"); CBT Factors Corporation, New York, New York ("Factors"); CBT

Realty Corporation, Hartford, Connecticut ("Realty"); and General Discount Corporation, Boston, Massachusetts ("GDC"). These companies, with the exception of CBT Trust, are subsidiaries of CBT Financial Corporation, Hartford, Connecticut, a company organized as a holding company for CBT's nonbanking subsidiaries. CBT Trust engages in general trust company activities in Florida. Lazere and BCC offer accounts receivable, inventory and equipment financing. Factors engages in "advance" and "maturity" factoring, and Realty in real estate lending. GDC, with subsidiaries in Maine, Massachusetts and Canada, engages in capital equipment financing through lending and leasing, and its Canadian subsidiary, CBT Leasing Limited, conducts such lending and leasing activities outside the United States pursuant to section 4(c)(13) of the Act (12 U.S.C. § 1843(c)(13)). All of these activities have been determined by the Board to be closely related to banking under sections 225.25(b)(1), (3) and (5) of Regulation Y (12 C.F.R. § 225.25(b)(1), (3) and (5)).

Notice of these applications, affording an opportunity for interested persons to submit comments, has been given in accordance with sections 3 and 4 of the Act (48 *Federal Register* 41524). The time for filing comments has expired and the Board has considered the applications and all comments received in light of the factors set forth in section 3(c) (12 U.S.C. § 1842(c)) and the considerations specified in section 4(c)(8) of the Act (12 U.S.C. § 1843(c)(8)). In particular, the Board has considered the comments of Citicorp, New York, New York, and Northeast Bancorp, Inc., New Haven, Connecticut, as well as the comments of several community groups located in Hartford, Connecticut.

BNE, with twelve bank subsidiaries, has consolidated assets of $5.9 billion and deposits of $3.7 billion, represent-

ing 13.3 percent of the total deposits in commercial banks in Massachusetts.[1] BNE is the fourth largest commercial banking organization in Massachusetts. CBT, which has total assets of $5.9 billion and total deposits of $3.4 billion, is the largest bank holding company in Connecticut. CBT holds 24.8 percent of all deposits in commercial banks in Connecticut. Upon consummation of the proposed merger, BNE would become the second largest bank holding company in New England in terms of assets and the largest in terms of domestic deposits.

Section 3(d) of the Act (12 U.S.C. 1842(d)), the Douglas Amendment, prohibits the Board from approving any application by a bank holding company to acquire any bank located outside of the state in which the operations of the bank holding company's banking subsidiaries are principally conducted, unless such acquisition is "specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication." The statute laws of Connecticut authorize the acquisition of a banking institution in Connecticut by a bank holding company that controls a bank located in another New England state, if that other New England state authorizes on a reciprocal basis the acquisition of a bank in that state by a Connecticut bank holding company.[2] Massachusetts has passed a reciprocal statute that authorizes such an acquisition.[3]

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1. Banking data are as of June 30, 1983.

2. 1983 Conn. Acts 411 (Reg. Sess.) entitled "An Act Concerning Interstate Banking" ("Connecticut Interstate Banking Act" or "CIBA"), § 2.

3. Mass. Ann. Laws ch. 167A ("Massachusetts Interstate Banking Act"), § 2.

The Banking Commissioner of Connecticut and the Massachusetts Board of Bank Incorporation have approved this proposed merger pursuant to these reciprocal Interstate Banking Acts, thus finding that the transaction satisfies the requirements of the respective statutes authorizing the interstate acquisition of banks. Based upon its review of the Connecticut Interstate Banking Act ("CIBA"), the Board concludes that Connecticut has by statute expressly authorized a Massachusetts bank holding company, such as BNE, to acquire a Connecticut bank or a Connecticut bank holding company, such as CBT. Thus, the Connecticut Act meets the requirement of express authorization for interstate bank acquisitions imposed by section 3(d) of the Bank Holding Company Act.

The Connecticut and Massachusetts statutes are the first to be enacted that provide explicitly for limited interstate banking on a regional basis. Rhode Island has also enacted regional interstate banking legislation that limits entry into Rhode Island to bank holding companies located in New England.[4] The restriction in the Rhode Island statute, however, is of limited duration. After two years the Rhode Island statute provides for national reciprocity, permitting entry of bank holding companies from any state that will admit Rhode Island bank holding companies.

The regional interstate banking system developing in New England raises issues of considerable importance because no fewer than 15 state legislatures are considering proposals that, if enacted, would create regional banking systems in every part of the country. The Georgia legislature has already passed a regional interstate banking statute, and there are proposals for regional banking sys-

4. R.I. Gen. Laws §§ 19-30-1, 19-30-2 (Supp. 1983).

tems in the Southeast (Florida and Georgia and a combination of other states as far north as Virginia), the Northwest (Washington, Oregon and Idaho), the Mid-Atlantic (New Jersey, Pennsylvania and several other states as far south as Virginia) and the Mid-West (several different regional groupings under discussion). Both the increasing number of states considering such proposals and the progress of the proposed legislation toward enactment suggest that, should the New England interstate banking zone be upheld, a system of regional zones may develop involving major areas of the nation.[5]

The Constitutionality of the Connecticut Statute

Protestants, Citicorp and Northeast Bancorp, Inc., have challenged the constitutionality of the Connecticut Interstate Banking Act[6] and, in particular, the provisions of CIBA that allow only New England bank holding compa-

5. To date, only Maine (Me. Rev. Stat. Am. tit. 9-B, § 1013 (as amended February 7, 1984)) and Alaska (Alaska Stat. § 06.05.235 (Supp. 1983)) permit interstate banking without restriction, although New York permits entry of bank holding companies from any state on a reciprocal basis (N.Y. Banking Law § 142-b (McKinney Supp. 1983)).

6. By letter of November 16, 1983, counsel for BNE asserts that Citicorp is not a party in interest to this proceeding with standing to raise issues concerning the constitutionality of CIBA. Pursuant to section 105 of the BHC Act, 12 U.S.C. § 1850, Northeast clearly will become a competitor to BNE upon consummation of this acquisition. Moreover, the Board believes that Citicorp, too, is a party in interest for purposes of this proceeding before the Board since Citicorp competes in Connecticut and Massachusetts with BNE and CBT, although on a somewhat limited basis, and, except for the restrictions contained in the very statute it challenges, it has the potential to become a more substantial competitor.

nies[7] to acquire banks or bank holding companies located in Connecticut. The Protestants assert that such discriminatory legislation is unconstitutional under the provisions of the Compact Clause,[8] the Equal Protection Clause[9] and the Commerce Clause[10] of the United States Constitution.

The requirement that the Board address these issues derives from a series of judicial decisions beginning with *Whitney National Bank in Jefferson Parish* v. *Bank of New Orleans and Trust Company,* 379 U.S. 411 (1965), which required that the Board make a finding in the first instance on the applicability and validity of state laws that purport to authorize the particular transaction before the Board.[11] The United States Court of Appeals for the District of Columbia Circuit confirmed that this requirement applied to constitutional issues when it stated in *Iowa Independent*

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7. New England bank holding companies include those with their principal place of business in Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont. The Connecticut statute further restricts the definition of "New England bank holding company" to exclude bank holding companies directly or indirectly controlled by bank holding companies outside of New England. CIBA thus prohibits non-New England bank holding companies from "leapfrogging" into the Connecticut market through Maine or other New England states that may enact interstate banking statutes without regional restrictions.

8. U. S. Const., Article I, section 10, clause 3.

9. U. S. Const., Amendment XIV, Section 1.

10. U. S. Const., Article I, section 8, clause 3.

11. Justice Douglas in his dissent in *Whitney* noted that the specific issue with respect to the Louisiana statute at issue in that case would require the Board to decide a "bare, bald question of . . . constitutionality." 379 U.S. at 431. See also *First State Bank of Clute* v. *Board of Governors,* 553 F.2d 950 (5th Cir. 1977), and *Gravois Bank* v. *Board of Governors,* 478 F.2d 546 (8th Cir. 1973), which do not deal with constitutional issues but require a decision by the Board as to the applicability of state laws to bank holding company acquisitions.

Bankers Association v. *Board of Governors of the Federal Reserve System,* 511 F.2d 1288, 1293 n.4 (1975), that it felt constrained "to register . . . substantial doubt that the Board can continue to presume conclusively the constitutional validity of state or federal laws in light of the Supreme Court's opinion in [*Whitney*] . . . ."

While in cases prior to *Iowa Independent Bankers, supra,* the Board declined to consider constitutional issues, *NCNB Corp.,* 59 Fed. Res. Bull. 305, 307 (1973),[12] the reservations about this course of action expressed by the D.C. Circuit in that case has led the Board to review the constitutionality of state statutes, although the Board has decided that it will not "hold a state statute to be unconstitutional without clear and unequivocal evidence of the inconsistency of the state law with the federal Constitution." *NCNB Corp.,* 68 Fed. Res. Bull. 54, 56 (1982).[13] The Board believes this standard to be consistent with the principle of statutory construction that legislatures are presumed to have acted within constitutional limits,[14] as well as with the historic role of the judicial branch of government in balancing state and federal interests in construing the scope of the constitutional powers of the states. This approach is also con-

12. See also *Bankers Trust New York Corp.,* 59 Fed. Res. Bull. 364 (1973) and *Northwest Bancorporation,* 38 Fed. Reg. 21,530 (1973).

13. See also *Florida Coast Banks, Inc.,* 68 Fed. Res. Bull. 781 (1982); *Florida Coast Banks, Inc.,* 69 Fed. Res. Bull. 454 (1983). Moreover, the Board has indicated on one occasion that were it to follow the interpretation of a state statute urged by a party to an application it would be compelled to declare the statute to be unconstitutional. *KSAD, Inc.,* 70 Federal Reserve Bulletin 44 (1984).

14. See *Clements* v. *Fashing,* 102 S. Ct. 2836, 2843 (1982); *South Carolina State Highway Department* v. *Barnwell Bros., Inc.,* 303 U.S. 177, 195 (1938); *Atchison, Topeka & Santa Fe Ry. Co.* v. *Matthews,* 174 U.S. 96 (1899).

sistent with the Board's primary expertise and delegated responsibility under the Act—to review bank holding company expansion proposals for compliance with the public benefits test of section 4(c)(8) of the Act, including financial, competitive and community convenience and needs criteria.

Thus, the Board will require evidence of a clear conflict with the United States Constitution before the Board will find that CIBA constitutes an invalid authorization for the interstate merger of bank holding companies proposed in this case.

The Board has examined carefully the arguments advanced by Protestants and the unique and fundamental constitutional issues presented by CIBA in the context of the extensive record before the Board. After review of the record, the Board concludes that, while the issue is not free from doubt, there is no clear and unequivocal basis for a determination that CIBA is inconsistent with the Commerce Clause, Compact Clause or Equal Protection Clause of the United States Constitution.[15] Accordingly, the Board will not deny this application on the grounds urged by Protestants that CIBA is unconstitutional. The analysis of this proposal under sections 3 and 4 of the Bank Holding Company Act is based upon this finding.

Considerations Under Sections 3 and 4 of the Bank Holding Company Act

In addition to determining that the merger of BNE and CBT is expressly authorized by a valid statute as required by section 3(d) of the BHC Act, the Board must decide

15. The staff analysis of the constitutional issues raised by Protestants is contained in an appendix to this Order and is made a part of the Board's findings in this case.

whether this acquisition is consistent with the standards of sections 3 and 4 of the Act.

Section 3 Considerations. BNE's twelve banking subsidiaries operate in nine of the fourteen Massachusetts banking markets,[16] while CBT's single bank subsidiary operates in each of the ten Connecticut banking markets.[17] Since BNE's banking subsidiaries do not operate in Connecticut and CBT's banking subsidiary does not operate in Massachusetts, the proposed transaction would not eliminate any significant existing competition in any relevant banking market.

The Board also has considered the effects of this proposal on probable future competition in light of its proposed guidelines for assessing the competitive effects of market-extension mergers or acquisitions.[18] In evaluating the effects of a proposal on probable future competition, the Board considers market concentration, the number of probable future entrants into the market, the size of the bank to be acquired, and the attractiveness of the market for entry on a *de novo* or foothold basis absent approval of the acquisition.

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16. These Massachusetts banking markets include Boston, Springfield, Cape Cod, Fall River, New Bedford, Amherst-Northhampton, Greenfield, North Adams-Williamstown and Athol. BNE also operates in the Massachusetts portion of the Providence, Rhode Island, banking market.

17. These Connecticut banking markets include Hartford, New Haven, Bridgeport, Waterbury, New London, Danbury, Torrington, Danielson, Willimantic and Old Saybrook. CBT also operates in the Connecticut portion of the New York market.

18. "Proposed Policy Statement of the Board of Governors of the Federal Reserve System for Assessing Competitive Factors under the Bank Merger Act and the Bank Holding Act," 47 *Federal Register* 9017 (March 3, 1982). Although the proposed policy statement has not been adopted by the Board, the Board is using the policy guidelines in its analysis of the effects of a proposal on probable future competition.

With respect to the ten banking markets in Connecticut in which CBT operates, the record shows that either the markets are not highly concentrated or there are numerous other probable future entrants into the markets. Connecticut permits the acquisition of banks in Connecticut by bank holding companies located in other NewEngland states, and there are a number of commercial banking organizations, including five in Massachusetts (other than BNE) and three in Rhode Island, with assets over $1 billion each that can be identified as probable future entrants into the Connecticut banking markets. Moreover, the Board notes that market concentration ratios and CBT's rank and market share drop significantly in each Connecticut market when deposits of thrift institutions are considered. In view of these considerations and other facts of record, the Board concludes that elimination of BNE as a probable future entrant into markets served by CBT would not have a substantial anticompetitive effect in those markets.

With respect to the nine Massachusetts[19] banking markets in which BNE operates, the record shows that there are a number of commercial banking organizations, including three commercial banking organizations in Connecticut (other than CBT) and three in Rhode Island with assets over $1 billion each, that can be identified as probable future entrants into each of the nine relevant markets. The markets with the fewest number of potential entrants, Boston and Cape Cod, are also not concentrated. Moreover, BNE is not a market leader in several markets, particularly when

19. BNE has less than a one percent market share in the Providence, Rhode Island, banking market and CBT has less than a one percent market share in the New York, New York, banking market. As a result, only Massachusetts and Connecticut markets are discussed in this Order.

the deposits of thrift institutions are considered. On the basis of these and other facts of record, the Board concludes that the elimination of CBT as a probable future entrant would not have a substantial anticompetitive effect in the nine markets served by BNE.

The financial and managerial resources of BNE, CBT, and their subsidiaries are considered satisfactory and their prospects appear favorable. This finding is based, in part, on the fact that BNE has committed to a program to raise additional capital through a common stock offering and, in particular, to improve the capital position of its lead bank, Bank of New England, N.A., Boston, Massachusetts.

The Board has considered the convenience and needs of the communities to be served. Although both BNE and CBT offer a complete range of banking services, consummation of this merger would provide more favorable access to the capital markets and thereby permit BNE to provide expanded access to consumer banking services in Connecticut and Massachusetts, additional credit capacity for growing commercial customers and the presence of a substantial New England based competitor to meet growing competition from nonbanking financial conglomerates in the financial services industry.

In considering the convenience and needs of the communities to be served, the Board has also examined the record of BNE and CBT and their banking subsidiaries in meeting the credit needs of their communities, as provided in the Community Reinvestment Act of 1977 (12 U.S.C. §§ 2901-05)("CRA") and the Board's Regulation BB (12 C.F.R. § 228). The CRA and Regulation BB require the Board to assess the record of the banking subsidiaries of any applicant in meeting the credit needs of their local commu-

nities, including low- and moderate- income neighborhoods, consistent with safe and sound operations. Although the Board does not ordinarily consider the CRA record of the acquiree, the Board, for purposes of this case, has considered the CRA records not only of BNE's banking subsidiaries but also that of CBT because this merger involves two bank holding companies of approximately equal size.

Three Hartford, Connecticut, neighborhood citizens associations, Frog Hollow Residents Coalition, Concerned Citizens of Southwest and Behind the Rocks Neighborhood Association, have protested this application on the basis of an alleged failure of CBT to meet the housing financing needs of the low- and moderate-income neighborhoods of Hartford.[20] In addition, the Frog Hollow Residents Coalition alleged that CBT has failed to honor a commitment made in July 1982 to provide a special fund for mortgage, home improvement and housing rehabilitation loans to owner-occupants of the Frog Hollow community.

The community group Protestants have failed to present any substantial evidence to support their position. Nevertheless, the Board has considered the issues raised by Protestants and the extensive response CBT has provided with respect to its lending history and practices in Protestants' neighborhoods. The record demonstrates that, pursuant to a July 1982 commitment, CBT has established a special housing-related lending program for the Frog Hollow community and has made a significant commitment of funds at

20. The Small Business Association of New England requested a hearing on the application to explore a concern that the merger of major New England banks would result in larger institutions that might not be responsive to the credit needs of small business enterprises. After a meeting with officials of CBT and BNE, the Small Business Association of New England was satisfied and it withdrew its request for a hearing.

favorable rates and without ancillary costs. CBT has also documented its commitment to meet the housing needs of low- and moderate-income neighborhoods through housing ventures with other companies and neighborhood groups.

In the neighborhoods of the other two Protestants, Behind the Rocks and Southwest, CBT has a strong record of home improvement loans and it ranks among the leading lending institutions in those areas in terms of the number of home improvement loans. CBT has also documented a low demand for first mortgages in these two areas. CBT has made a commitment to increase its efforts to make residents of Protestants' communities aware of its loan programs. Based on the foregoing and other facts in the record, the Board concludes that CBT and BNE have satisfactory records of compliance with the CRA. The considerations relating to the convenience and needs of the communities to be served weigh in favor of approval.

Section 4 (c)(8) Considerations. BNE has also applied under section 4(c)(8) of the BHC Act to acquire the nonbanking subsidiaries of CBT, including Lazere, BCC, Factors, GDC and Realty, which are all organized as subsidiaries of CBT Financial.[21] BNE has only one active nonbanking subsidiary operating pursuant to section 4(c)(8).[22] CBT's only nonbanking subsidiary that operates in Massachusetts is GDC, which is engaged in leasing and lending activities. GDC derives approximately $14 million in com-

21. CBT's nonbanking subsidiaries will represent less than two percent of the consolidated assets of the merged corporation.

22. BNE received approval after the filing of this application to acquire *de novo* a subsidiary to engage in leasing activities. That subsidiary, BNE Capital Corporation, Boston, Massachusetts, began operations on December 28, 1983.

mercial loans and leasing activities from the entire state of Massachusetts.

This proposal would have only minimal impact on actual competition among nonbanking subsidiaries of BNE and CBT. Moreover, this proposal will have no significant impact on existing competition between BNE's subsidiary banks and GDC. Given the size of CBT's equipment financing subsidiary and the limited scope of its activities in Massachusetts, the Board does not believe this transaction will result in any significant decreased competition.

There is no evidence in the record that this transaction will result in any undue concentration of resources, unfair competition, unsound banking practices, conflicts of interest or other adverse effects. Based upon these and other considerations reflected in the record, the Board has determined that the balance of public interest factors that it is required to consider under section 4(c)(8) of the Act is favorable.

Based on the foregoing and other facts of record, the Board has determined that the applications under section 3 and 4 of the Act should be and hereby are approved for the reasons set forth above.

In approving this application the Board does not intend to express any conclusion concerning the desirability, as a matter of national policy, of the regional arrangements provided for by CIBA. The Board recognizes that interstate banking is a highly complex issue that unavoidably involves the balancing of a number of different considerations. However, if the New England regional approach to interstate banking is emulated in other parts of the country, there is a potential danger that the result could be to divide the country into a number of banking regions. The Board be-

lieves that the public policy issues that are raised by the regional approach are inherently national and would be best resolved by Congressional action.

The acquisition of CBT's banking subsidiaries pursuant to section 3 of the Act shall not be made before the thirtieth calendar day following the effective date of this Order or later than three months after the effective date of this Order, unless such period is extended for good cause by the Board or by the Federal Reserve Bank of Boston, pursuant to delegated authority. The approval of BNE's proposal to acquire CBT's nonbank subsidiaries and to engage in equipment financing, leasing, real estate lending, factoring, and accounts receivable financing is subject to all the conditions set forth in Regulation Y, including section 225.4-(d) and section 225.23(b), and to the Board's authority to require modification or termination of the activities of a holding company or any of its subsidiaries as the Board finds necessary to assure compliance with the provisions and purposes of the Act and Board's regulations and orders issued thereunder, or to prevent evasion thereof.

By order of the Board of Governors,[23] effective March 26, 1984.

(signed) James McAfee

JAMES MCAFEE
Associate Secretary of the Board

[SEAL]

23. Voting for this action: Chairman Volcker and Governors Martin, Wallich, Partee, Teeters, Rice, and Gramley.

Appendix to the Order Approving the Application of Bank of New England Corporation, Boston, Massachusetts, to Merge with CBT Corporation, Hartford, Connecticut

Citicorp, New York, New York, and Northeast Bancorp, Inc., New Haven, Connecticut, have protested the application of Bank of New England Corporation, Boston, Massachusetts, to merge with CBT Corporation, Hartford, Connecticut. Citicorp and Northeast argue that the application should be denied because the Connecticut Interstate Banking Act ("CIBA") is unconstitutional and therefore insufficient to authorize the proposed merger. Protestants challenge the provisions of CIBA that allow only New England bank holding companies[1] to acquire banks or bank holding companies located in Connecticut. The Protestants assert that such discriminatory legislation is unconstitutional under the provisions of the Compact Clause,[2] the Equal Protection Clause[3] and the Commerce Clause[4] of the United States Constitution.

CIBA (and the similar statute enacted in Massachusetts) raises unique constitutional issues. There are many decided

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1. New England bank holding companies include those with their principal place of business in Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont. The Connecticut statute further restricts the definition of "New England bank holding company" to exclude bank holding companies directly or indirectly controlled by bank holding companies outside of New England. CIBA thus prohibits non-New England bank holding companies from "leapfrogging" into the Connecticut market through Maine or other New England states that may enact interstate banking statutes without regional restrictions.

2. U.S. Const., Article I, section 10 clause 3.

3. U.S. Const., Amendment XIV, Section 1.

4. U.S. Const., Article I, section 8, clause 3.

cases defining the permissible scope of state regulations favoring their own residents against those of all other states, but apparently no judicial decisions testing the constitutionality of state regulatory arrangements which discriminate in favor of residents of selected regional groupings of states and exclude residents of all other states from the benefits provided to the regional groups.[5]

Considerations Under the Compact Clause

The Compact Clause of the United States Constitution states that "[n]o State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power. . . ."[6]. The Supreme Court has indicated that an interstate agreement is within the parameters of the Compact Clause and thus subject to the requirement of congressional consent only when: (1) an interstate compact or agreement exists, (2) that tends to increase the power of the compacting states in such a manner as to interfere with federal supremacy.[7]

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5. While there are judicial decisions upholding interstate agreements, these agreements have not had the objective of discrimination but rather that of cooperation on a subject matter of exclusive interest to the states that are parties to these agreements. *See, e.g., Washington Metropolitan Area Transit Authority* v. *One Parcel of Land,* 706 F.2d 1312, 1314 (4th Cir.), *cert. denied,* 104 S. Ct. 238 (1983); *Jacobson* v. *Tahoe Regional Planning Agency,* 566 F.2d 1353, 1357 (9th Cir. 1977), *aff'd in part and rev'd in part sub nom. Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency,* 440 U.S. 391 (1979).

6. Art. I, § 10, cl. 3. This clause has been invoked infrequently, particularly in recent years when expanded interpretation of what constitutes interstate commerce has meant that agreements among states more frequently might be invalidated as burdening interstate commerce in violation of the Commerce Clause.

7. See *United States Steel Corporation* v. *Multistate Tax Commission,* 434 U.S. 452 (1978); *Virginia* v. *Tennessee,* 148 U.S. 503 (1893).

CIBA, when considered in light of its legislative history and the actions of other New England states, is part of an effort to create a regional banking zone. The regional banking acts of Connecticut, Massachusetts and Rhode Island contain very similar provisions, and they were enacted within a six-month period between December, 1982, and June, 1983. Passage of the acts was preceded during a four-month period by a formal meeting of representatives of the New England states to discuss regional interstate banking, by the formation of a New England Committee to Study and Promote Regional Interstate Banking, by testimony of legislators at hearings on the issue before legislative committees in other New England states, and by apparent review and comments on the proposed Connecticut legislation by the Massachusetts Banking Department. The debate on the Connecticut bill refers to an "agreement" or "compact" on regional interstate banking.[8]

The Supreme Court in *Virginia* v. *Tennessee,* 148 U.S. 503, 517-518 (1893), stated that the terms "agreement" and "compact" as used in the Compact Clause are "sufficiently comprehensive to embrace all forms of stipulation, written or verbal, and relating to all kinds of subjects." In *United States Steel Corp.* v. *Multistate Tax Commission,* 434 U.S. 452, 470 (1978), the Court specifically addressed the issue of reciprocal statutes and stated that "agreements effected through reciprocal legislation may present opportunities for enhancement of state power at the expense of the federal

8. See Transcripts of Connecticut Senate Debate, May 18, 1983 ("Conn. Sen. Debate") at 61, 96 (Sen. Sullivan); Transcripts of Connecticut House of Representatives Debate, May 26, 1983 ("Conn. House Debate") at 224, 234, 236 (Rep. Onorato) and 276, 277 (Rep. Jaekle).

supremacy similar to the threats inherent in a more formalized 'compact' . . ." The Court emphasized that the federal impact rather than the form of the agreement is the critical inquiry under the Compact Clause. Accordingly, while in form CIBA can be considered to be part of an implicit compact or agreement that has never been approved or authorized by Congress, as the cases cited above indicate, CIBA would violate the Compact Clause only if it constitutes an enhancement of state powers at the expense of federal supremacy.

No such claim of infringement upon federal supremacy could be maintained, however, if CIBA has been authorized by Congress in the Douglas Amendment. The compatibility of CIBA with the Compact Clause turns on whether Congress in the Douglas Amendment granted the states plenary power to regulate entry of out-of-state bank holding companies, thereby renouncing a federal interest in such regulation for purposes of the Compact Clause. The intent of Congress in enacting the Douglas Amendment is more fully discussed below, *infra* at 15-27, and, for reasons stated therein, the Douglas Amendment should be read as a renunciation of federal interest in regulating the interstate acquisition of banks by bank holding companies. As a result CIBA does not appear to violate the Compact Clause.

Considerations Under the Equal Protection Clause

Protestants also challenge the constitutionality of CIBA as a violation of the Equal Protection Clause of the Fourteenth Amendment, which provides "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." Protestants argue that CIBA's exclusion

of non-New England bank holding companies is an arbitrary restriction unrelated to any legitimate state purpose.

The Supreme Court in *New Orleans* v. *Dukes*, 427 U.S. 297, 303 (1976) (per curiam), articulated the following, frequently cited standard of judicial scrutiny under the Equal Protection Clause:[9]

> Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory distinctions and require only that the classification challenged be rationally related to a legitimate state purpose.

Application of the test of whether economic legislation is "rationally related to a legitimate state purpose" involves two inquiries: (1) whether the challenged statute has a legitimate purpose, and (2) whether it was reasonable for the legislature to believe the challenged classification would promote that purpose.[10]

In answering these inquiries, the Supreme Court has afforded great deference to a state's statements of legislative purpose and its statutory classifications to achieve those purposes. The Supreme Court has ordinarily been willing to uphold any classification based "upon a state of facts that reasonably can be conceived to constitute a distinction, or difference in state policy. . ." *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U.S. 522, 530 (1959). The court will sustain economic legislation "if any set of facts reason-

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9. See also *Dandridge* v. *Williams*, 397 U.S. 471, 484-486 (1971); *Iowa Independent Bankers Association* v. *Board of Governors, supra.*

10. See *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 461-463 (1981); *Western and Southern Life Insurance Co.*, 451 U.S. at 668.

ably may be conceived to justify it." *McGowan* v. *Maryland,* 366 U.S. 420, 426 (1961).

For the purpose of analysis under the Equal Protection Clause, CIBA appears to be rationally related to an attempt to maintain a banking system responsive to local needs in New England. The Hebb Report, a report prepared by a Commission appointed by the Connecticut legislature to study interstate banking, indicates that the purposes of CIBA include avoiding undue concentration of resources, maintaining the responsiveness of the banking system to local credit needs and providing an opportunity for a limited interstate banking experiment.[11] A finding of a rational basis for CIBA is consistent with the decision of the Court of Appeals for the District of Columbia Circuit in *Iowa Independent Bankers, supra,* upholding an Iowa statute against an Equal Protection Clause argument although that statute permitted only one out-of-state bank holding company to operate in Iowa. This case held that state statutes, such as CIBA, governing admission of out-of-state bank holding companies into a particular state, such as Connecticut, involve essentially economic legislation and do not raise issues of fundamental rights or draw upon suspect classifications. Since CIBA does not impinge those rights found to be fundamental by the Supreme Court or employ inherently suspect classifications, it will not be closely scrutinized by the courts under the Equal Protection Clause.

Thus, Connecticut can advance a sufficiently rational purpose in enacting CIBA to meet the less stringent scru-

11. "The Report to the General Assembly of the State of Connecticut of The Commission to Study Legislation to Limit the Conduct of Business in Connecticut by Subsidiaries of Bank Holding Companies," January 5, 1983 ("The Hebb Report"), pp. 10, 12-13.

tiny of the courts under the "rational purpose" test. On this basis, CIBA does not appear to violate the Equal Protection Clause of the Fourteenth Amendment.

Considerations Under the Commerce Clause

BNE and CBT assert that Congress, in the Douglas Amendment, conferred upon each state complete authority to permit, regulate or condition the entry into the state by out-of-state bank holding companies for the purpose of engaging in banking activities. BNE and CBT argue that Congress authorized the states not only to determine whether to permit acquisitions of banks across state lines but also to determine the extent to which to permit such acquisitions. Protestants, on the other hand, assert that the Douglas Amendment does not authorize states to place discriminatory restrictions on the admission of out-of-state bank holding companies, particularly on a state-by-state basis.

1. CIBA Under the Commerce Clause

Absent congressional authorization of CIBA in the Douglas Amendment, it appears that CIBA would be inconsistent with the standards for state action under the Commerce Clause as establishd by the Supreme Court. The central concern behind the Commerce Clause, according to the Court, is a desire "to avoid the tendencies toward economic Balkanization that had plagued relations between the Colonies and later among the States under the Articles of Confederation," *Hughes* v. *Oklahoma*, 441 U.S. 322, 325-326 (1978), and to create a "federal free trade unit" based on a principle that "our economic unit is the Nation" and

that "the states are not separable economic units." *H. P. Hood & Sons, Inc.* v. *DuMond,* 336 U.S. 525, 537-538 (1947).

The Court has applied the Commerce Clause as granting Congress the power "[to] regulate commerce . . . among the several states",[12] and also as a limitation on the power of the states to impose barriers to or burdens on interstate commerce.[13] The basic rationale for this interpretation is both economic and political, and these concerns are particularly applicable to state statutes that selectively confer benefits on one or more other states and deny these same benefits to still other states. The Court has forcefully stated these core concerns:

> This Court has not only recognized this disability of the state to isolate its own economy as a basis for striking down parochial legislative policies designed to do so, but it has recognized the incapacity of the state to protect its own inhabitants from competition as a reason for sustaining particular exercises of the commerce power of Congress to reach matters in which states were so disabled.
>
> The material success that has come to inhabitants of the states which make up this federal free trade unit has been the most impressive in the history of commerce, but the established interdependence of the states only emphasizes the necessity of protecting interstate movement of goods against local burdens and repressions. We need only consider the consequences if each of the few states that produce copper, lead, high-grade iron ore, timber, cotton, oil or gas should decree that industries located in that state shall have priority. What fantastic rivalries and dislocations

12. U. S. Const., Art. I, § 8, cl. 3.

13. *Great Atlantic and Pacific Tea Company* v. *Cottrell,* 424 U.S. 366, 370-71 (1976).

> and reprisals would ensue if such practices were begun!
>
> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

H. P. Hood & Sons, 336 U.S. at 538-39 (citations omitted).

The states retain the authority, particularly pursuant to their powers to safeguard the health and safety of their residents, to regulate matters of legitimate local concern in such a way as may impose incidental burdens on interstate commerce. However, the states may not regulate in a manner that imposes more than an incidental burden on interstate commerce[14] or that discriminates against articles of commerce from outside a given state unless there is some reason apart from their origin to treat them differently.[15]

In those instances where the states have acted to effect purposes of simple economic protectionism or in a manner that is patently discriminatory, the Supreme Court has held such state statutes to be *per se* unconstitutional.[16] In those cases where the states credibly advance a legitimate state purpose other than protection of local business, the

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14. *Philadelphia* v. *New Jersey*, 437 U.S. 617, 624 (1978).

15. *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. at 27, (1980). See also *Philadelphia* v. *New Jersey, supra*, at 626-627.

16. *Philadelphia* v. *New Jersey, supra*, at 624.

Court has applied a balancing test, weighing whether the statute in question serves a legitimate state purpose and whether it could accomplish that purpose in a manner less burdensome to interstate commerce.[17]

Absent authorization by the Douglas Amendment, it would appear that, under the standards applied by the Court[18], CIBA imposes a burden on interstate commerce of the type that would be found by the courts to violate the Commerce Clause. CIBA permits only bank holding companies located in New England to engage in banking activities in Connecticut while denying that right to bank holding companies located elsewhere. The discriminatory nature of CIBA is apparent from its legislative history, which demonstates the intention of the Connecticut legislature to permit Connecticut banks and bank holding companies to develop and consolidate on a regional basis before having to compete with banks outside the region.[19]

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17. *Hughes* v. *Oklahoma*, 441 U.S. 322, 336 (1979); *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

18. See *Dean Milk Co.* v. *Madison*, 340 U.S. 349 (1951) (ordinance of the City of Madison, Wisconsin, requiring all milk sold in Madison to be processed and bottled at a plant within five miles of the city); *Pennsylvania* v. *West Virginia*, 262 U.S. 553 (1923) (West Virginia requirement that all local needs for natural gas be met before natural gas could be shipped out of the state); *H. P. Hood & Sons* v. *DuMond*, 336 U.S. 525 (1949) (denial of a milk receiving plant in New York to a Massachusetts distributor because it would injure local competition); *Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978) (New Jersey law prohibiting the import of liquid or solid waste which originated or was collected outside the State of New Jersey; *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27 (1980) (Florida law prohibiting out-of-state bank holding companies from engaging in investment advisory activities).

19. The Hebb Report, *supra*, at 12. See also Conn. Sen. Debate, *supra*, at 60, 64, 70 (Statement of Senator Sullivan) and Conn. House Debate at 241, 258 (Statement of Representative Onorato).

BNE and CBT contend that CIBA does not conflict with the Commerce Clause decisions of the Supreme Court because CIBA relieves the ban or burden on interstate commerce imposed by Congress to the extent that it would replace six different banking zones in the individual New England states with a single barrier-free New England zone. They argue that Congress has imposed a restriction on interstate banking in the Douglas Amendment and that it has permitted the states to lift that ban by a specific statutory enactment.

In support of this position, BNE and CBT cite *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794, 815-816 (Stevens, J. concurring) (1976). In *Alexandria Scrap*, the Supreme Court upheld a Maryland statute that paid a bounty for destruction of any junked car formerly titled in Maryland despite a challenge that the statute made it easier for Maryland scrap processors to prove that a vehicle had been titled in Maryland than it did for out-of-state processors. The Court held that where a state acted as a market participant the Commerce Clause did not apply.[20] The Connecticut regional banking zone at issue in this case is clearly an example of the regulatory rather than proprietary function of the State of Connecticut, and Connecticut is not itself creating commerce by its own direct intervention in the marketplace. The reliance of BNE and CBT on the *Alexandria Scrap* rationale thus appears to be misplaced and, in fact, succeeding Supreme Court decisions seem to limit the *Alexandria Scrap* reasoning to those situations where the states are "market participants" rather than

20. In his concurring opinion, Justice Stevens suggested that the decision in effect held that, since Maryland "created a market that did not previously exist," it could not be found to burden commerce. 426 U.S. at 815-816.

"market regulators." See *Reeves, Inc.* v. *Stake,* 447 U.S. 429, 436 (1980).[21]

Even if CIBA were not to be considered a *per* se unconstitutional burden on interstate commerce, the disparate treatment of non-New England bank holding companies does not appear to be justified "as an incidental burden necessitated by legitimate local concerns." *Lewis* v. *BT Investment Managers, supra,* 447 U.S. at 42. The Supreme Court suggested in the *Lewis* case that with respect to banking there are legitimate state interests in "discouraging undue economic concentration," "maximizing local control" and "regulating financial practices presumably to protect local residents from fraud." *Id.* at 43. The Court, however, found in that case that a complete ban on out-of-state entry into the trust business in Florida could not be justified as an incidental burden necessitated by legitimate local concerns. The Court noted that there were other regulatory techniques available to deal with local concerns that non-resident bank holding companies were more likely to be sources of monopoly power or fraud than local companies.

Similarly, in this case, there are less restrictive means than a discriminatory geographic restriction to accomplish the objectives of the Connecticut legislature. There is no indication that all New York or New Jersey companies, for example, raise greater problems with respect to local con-

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21. "[T]he Commerce Clause responds principally to state taxes and regulatory measures impeding private trade in the national marketplace. . . . There is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market." *Id.* at 436-437 (citations omitted). See also *White* v. *Massachusetts Council of Construction Employers,* 103 S. Ct. 1042 (1983); *United Building & Construction Trades Council* v. *Mayor & Council of Camden,* 52 U.S.L.W. 4187 (U.S. Feb. 21, 1984).

trol and economic concentration than those of Massachusetts and Rhode Island. To accomplish the objective of avoiding concentration of resources in a non-discriminatory manner limitations could be placed on total banking assets or total deposits that a bank holding company may hold in order to qualify for additional acquisitions within Connecticut. These and other less discriminatory alternatives suggest that CIBA would not be viewed as an incidental burden on interstate commerce necessitated by legitimate local concerns. This conclusion is consistent with the Supreme Court's finding in the *Lewis* case that Florida's interest in local control did not justify a prohibition on entry of non-resident trust companies because of the discriminatory burden which the limitation imposed on interstate commerce. Thus, CIBA does not appear to be consistent with the prohibition in the Commerce Clause on discrimination against interstate commerce by the states.[22]

2. *Discrimination Authorized by the Douglas Amendment.*

BNE and CBT, however, contend that the Douglas Amendment authorizes the discrimination provided for by CIBA. The Douglas Amendment provides:

> Notwithstanding any other provision of this section, no application shall be approved under this section which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank located outside

22. In *Northeast Bancorp* v. *Wolf*, (Civil Action H-83-654), the U.S. District Court for the District of Connecticut in an opinion issued December 16, 1983, dismissed a challenge to the Connecticut Act on standing grounds but it described the Act as ". . . statutory provisions that discriminate between New England and non-New England banks . . . ."

> of the State in which the operations of such bank holding company's banking subsidiaries were principally conducted on July 1, 1966, or the date on which such company became a bank holding company, whichever is later, unless the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication. For the purposes of this section, the State in which the operations of a bank holding company's subsidiaries are principally conducted is that State in which total deposits of all such banking subsidiaries are largest.

12 U.S.C. § 1842(d)(1). The Supreme Court in *Lewis, supra,* 447 U.S. at 47, described this language as establishing a general federal prohibition on acquisition or expansion of banking subsidiaries across state lines and as conferring on the states only "authority to create exceptions to this general prohibition."

It is clear that if Congress, in the Douglas Amendment, authorized discriminatory state action, CIBA would not be unconstitutional under the Commerce Clause. In the specific context of the Douglas Amendment, the Supreme Court has stated that Congress may prohibit as well as promote commerce[23] and may exercise its plenary power under the Commerce Clause "by conferring upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy." *Lewis* v. *RT Investment Managers, Inc.*, 447 U.S. 27, 44 (1980).[24] The issue presented by CIBA is the extent of a state's powers when it

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23. See *Prudential Insurance Company* v. *Benjamin*, 328 U.S. 408, 434 (1946).

24. See also *Prudential Insurance Company* at 423-24.

decides to lift the Douglas Amendment prohibition. Does the Douglas Amendment, which establishes a total prohibition on acquisitions by out-of-state bank holding companies, authorize a state to discriminate among the states when it permits entry? Does the Douglas Amendment permit Connecticut to admit bank holding companies from neighboring Massachusetts and other New England states meeting certain qualifications regarding reciprocity but not from other states even if they were to meet the reciprocity qualifications?

It is, therefore, necessary to determine the scope of authorization, if any, for states to discriminate among other states in lifting the Douglas Amendment's ban against interstate acquisition of banks by bank holding companies. This task is more difficult because, as noted above, this case involves an unusual form of discrimination. There is a long history of decisions of the Supreme Court and lower federal courts involving the application of the Commerce Clause to state laws that provide a preference for their own residents as against those of *all* other states. No case has been found under the Commerce Clause or generally in the literature on this Clause, in which a state has provided for preferential treatment of its own citizens and those of selected other states, while excluding the residents of all other states from this favored treatment.

In deciding cases where the differential treatment is applied against all other states equally, the Supreme Court requires, in order to find an authorization for discrimination in federal statutes, that such authorization be "ex-

pressly"[25] or "explicitly"[26] or "specifically"[27] stated in federal law. In *Sporhase* v. *Nebraska,* 458 U.S. 941, 960 (1982), defendants challenged a Nebraska law restricting the export of ground water as an impermissible burden on interstate commerce. Nebraska argued in defense of its statute that the congressional intent to authorize otherwise impermissible burdens on interstate commerce was demonstrated by 37 federal statutes in which Congress had indicated its intent not to preempt state water laws and by congressional authorization of certain interstate surface water compacts. The Court rejected this argument, holding that these federal statutes did not show an "expressly stated" intention to remove Commerce Clause restraints on state water laws. Similarly, in *New England Power Company* v. *New Hampshire,* 455 U.S. 331, 341 (1982), and in *Lewis, supra,* the Court held that federal statutes reserving to the states residual authority over export of electricity or over bank holding companies were in no sense affirmative grants of power to the states to impose undue burdens on interstate commerce. The Court may have relaxed this high standard somewhat in *White* v. *Massachusetts Council of Construction Employees,* 103 S. Ct. 1042 (1983), where it approved geographic restrictions on the hiring of non-resident workers for city-funded construction projects, relying upon the explicit regulations of the Department of Housing and Urban Development and a general, unspecific authorization in federal statute for such regulations.

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25. *New England Power Co.* v. *New Hampshire,* 455 U.S. 331, 340-41 (1982).

26. *Western and Southern Life Insurance Co.* v. *State Board of Equalization,* 451 U.S. 648, 653-654 (1981).

27. *White* v. *Massachusetts Council of Construction Employers,* 103 S. Ct. 1042 (1983).

Based on these requirements for specificity, the Douglas Amendment does not appear *on its face* to authorize discrimination by Connecticut in favor of its own residents and those of Massachusetts and other New England states having reciprocal laws, but against all other states. The Douglas Amendment's general authorization to the Board of Governors to permit interstate acquisitions if they are "... specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication," does not appear to meet the stringent test of explicitness laid down by the Supreme Court.

BNE and CBT argue, however, that the legislative history of the Douglas Amendment indicates the intention of the Congress to give the states complete discretion in setting the terms of entry of out-of-state bank holding companies without the limitations imposed by the Commerce Clause. While reliance on the legislative history is a valid method of determining that Congress authorized the lifting of Commerce Clause restrictions with respect to a particular state enactment, the Supreme Court has expressed reluctance to place undue weight on this type of inquiry in an attempt to find authority from Congress for states to discriminate against the residents of other states. The Court has stated:

> Reliance on . . . isolated fragments of legislative history in divining the intent of Congress is an exercise fraught with hazards, and "a step to be taken cautiously."

New England Power, 455 U.S. at 341, quoting *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1, 26 (1976). When

Congress has not expressly stated an intent to permit state legislation otherwise inconsistent with the Commerce Clause, the Court has no authority to rewrite the legislation "based on mere speculation of what Congress probably had in mind." *Id.* at 343.[28]

The Douglas Amendment was proposed during the debate on the Senate floor and there is no committee or other significant legislative history to clarify its meaning.[29] There was very little discussion of the power of the states to override the interstate banking ban imposed by the Douglas Amendment and no discussion of the power of the states to discriminate among potential out-of-state entrants.[30] Congress was clearly more concerned with the federal prohibition on interstate acquisitions than on terms under which the states could lift this ban.

In his remarks during the Senate debate, Senator Douglas, sponsor of the Amendment, referred to the ability of the states to permit the entry of out-of-state bank holding companies "only to the degree that state laws ex-

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28. The Court has allowed discrimination against other states generally based upon a clear statement of congressional intent contained in the legislative history of a federal statute. Relying on the clearly expressed intention of Congress, derived from the legislative history, to leave insurance regulation exclusively to the states, the Court has found the McCarran-Ferguson Act, 15 U.S.C. § 1011, *et seq.*, to authorize discriminatory state statutes that would otherwise offend the Commerce Clause. *Prudential Insurance Company* v. *Benjamin*, 328 U.S. 408, 427-432 (1946), and *Western and Southern Life Insurance Co., supra*, 451 U.S. at 465.

29. The pertinent debates are found at 102 Cong. Record 6750-58 and 6854-62 (1956).

30. See *Iowa Independent Bankers* v. *Board of Governors of the Federal Reserve System*, 511 F.2d 1288 (D.C. Cir.), *cert. denied* 423 U.S. 875 (1975).

pressly permit them."[31] He also stated that the Amendment paralleled the McFadden Act restrictions on the power of national banks to branch intrastate and interstate "in a way contrary to State policy."[32] Thus it can be persuasively argued that Senator Douglas construed his amendment as granting plenary power to the states to set their own policies and to permit entry of out-of-state bank holding companies to the degree that they chose. However, there is also an argument that the excerpts from the Senate debate are too fragmentary and unspecific to show congressional intent to authorize discrimination otherwise contrary to the Commerce Clause, especially where the Supreme Court has required such explicit and clear authorization of discrimination by the Congress because of the fundamental implications of such discrimination for the federal union.

The Board has a limited amount of judicial guidance on this issue. The only court to consider the legislative history of the Douglas Amendment has been the U.S. Court of Appeals for the District of Columbia Circuit in *Iowa Independent Bankers Association* v. *Board of Governors,* 511 F.2d 1288, 1293 (1975). The case involved, in part, a challenge under the Equal Protection Clause of the Fourteenth

31. "[W]hat our amendment aims to do is to carry over into the field of holding companies the same provisions which already apply for branch banking under the McFadden Act—namely, our amendment will permit out-of-State holding companies to acquire banks in other States only to the degree that State laws expressly permit them; and that is the provision of the McFadden Act." 102 Cong. Record 6858 (1956).

32. "[The amendment] is a logical continuation of the principles of the McFadden Act, which tried to prevent the Federal power from being used to permit national banks to expand across State lines in a way contrary to State policy and, of course, under the McFadden Act, even to expand within a State." 102 Cong. Record 6860 (1956).

Amendment to the Iowa statute that permitted, on the basis of their location in the state prior to the enactment of the Bank Holding Company Act Amendments of 1970, out-of-state bank holding companies operating two or more banks in Iowa to continue to expand and to acquire new banks in Iowa on the same basis as a local bank holding company.

A less stringent standard applies to state action under the Equal Protection Clause than under the Commerce Clause. Under the former provision a state need only show that its economic legislation, presuming it does not affect fundamental rights or create a suspect classification, bears a rational relationship to a legitimate state purpose. Under the Commerce Clause, however, discrimination is disabling *per se,* and even when a statute only imposes an incidental burden on interstate commerce it will be struck down if such burden is clearly excessive in relation to expected local benefits. The Court upheld the constitutionality of the Iowa statute under the Equal Protection Clause on the basis that it was actually a statute that conferred grandfather rights on the only out-of-state bank holding company operating in Iowa.

The Court then turned to petitioners argument that the Iowa statute conflicted with federal law, specifically with the Douglas Amendment. Petitioners in *Iowa Independent Bankers* advanced the argument that the Iowa statute conflicted with "implicit . . . prohibition against discrimination between out-of-state bank holding companies,"[33] which, they asserted, was intended by Congress in the Douglas Amendment. They argued that under the Douglas Amendment states may only decide "whether to extend the right to acquire in-state banks to all out-of-state bank holding

33. *Iowa Independent Bankers, supra,* 511 F.2d at 1296.

companies or to prohibit such acquisitions entirely."[34] The Court then reviewed the limited legislative history of the Douglas Amendment and these arguments, finding that Congress did not intend to bar discrimination like that embodied in the Iowa statute. The Court also stated that the Douglas Amendment conferred on the states a right to control the expansion of interstate banking "so that such expansion would not contravene state policy."[35]

The Court's review of the legislative history of the Douglas Amendment in *Iowa Independent Bankers* was not conducted for purposes of determining the validity of the Iowa statute under the Commerce Clause. Therefore, the Court did not focus on the Supreme Court's standard of review under the Clause and did not consider whether the alleged legislative authorization by the Douglas Amendment is express and unambiguous so as to sanction discrimination against interstate commerce that would otherwise run afoul of the Commerce Clause.

The actions of the states and the Board in interpreting and applying the Douglas Amendment also lend some support to the position that the Amendment authorizes the states to permit restricted or conditional entry of out-of-state bank holding companies such as sanctioned by CIBA. As early as 1972, Iowa enacted a statute that accorded certain grandfather rights to expand and to make additional acquisitions to out-of-state bank holding companies already controlling two or more banks in Iowa[36]—establishing, in

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34. *Ibid.*

35. *Id.* at 1297. In *Conference of State Bank Supervisors* v. *Conover*, 715 F.2d 604, 615 (1983). The Court of Appeals for the D.C. Circuit restated its conclusion that the legislative history of the Douglas Amendment allowed a state "to discriimnate in admitting bank holding companies."

36. Iowa Code Ann. § 524.1805.

fact, a preference for a particular out-of-state bank holding company against all other non-resident companies. Recently, Nebraska enacted a similar statute.[37] In addition, Delaware,[38] Maryland,[39] Virginia[40] and Nebraska[41] have permitted out-of-state bank holding companies to acquire local banks under certain conditions, including limitations on activities, number of offices and home office location, which are not imposed on in-state bank holding companies. One of the major purposes of such legislation is to gain employment for local residents and tax revenues for the state without seriously affecting competing local banking businesses; the statutes accomplish this by permitting out-of-state bank holding companies to export their credit card operations to states with less restrictive usury laws. Similarly, South Dakota has recently permitted the entry of out-of-state bank holding companies on a limited basis to acquire a state bank with a broad range of insurance powers.[42] The Board has approved a number of applications by out-of-state bank holding companies to acquire local banks under the credit card or grandfather statutes[43] and, as noted above, the U.S. Court of Appeals for the Dis-

37. Neb. Rev. Stat. § 8-903 (Supp. 1983).

38. Del. Code Ann., title 5, § 803.

39. Md. Fin. Inst. Code Ann. § 5-901.

40. Va. Code § 6.1-390 to 6.1-397.

41. Neb. Rev. Stat. §§ 8-905, 8-906 (Supp. 1983).

42. S.D. Codified Laws Ann. §§ 51-16-40 to 51-16-44 (Supp. 1984).

43. *See, e.g., Citicorp,* 67 Fed. Res. Bull. 181 (1981); *J.P. Morgan & Company, Inc.,* 67 Fed. Res. Bull. 917 (1981); *Northwest Bancorporation,* 38 Fed. Reg. 21,530 (1973).

trict of Columbia has upheld a Board order under the Iowa statute.[44]

These statutes obviously result in some burdens on interstate commerce and appear to assume that the states have full discretion to set the terms of entry of out-of-state bank holding companies.[45] Nothing in the history of the Douglas Amendment suggests that the states were to be permitted only to choose between not allowing out-of-state bank holding companies to enter, and allowing completely free entry.[46] In approving applications under these statutes, the Board appears to have accepted at least some measure of discretion rather than requiring a simple "on and off switch." A contrary conclusion would seem to raise some questions about the validity of the state statutes cited above, although it would appear that such statutes might be viewed as imposing substantially less of a burden on commerce in the furtherance of legitimate state objectives than CIBA imposes.

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44. *Iowa Independent Bankers Association, supra.*

45. To a lesser degree state statutes that permit limited out-of-state acquisition only in the case of a troubled bank in need of financial assistance also allow the states to condition entry. See, for example, Wash. Rev. Code Ann. § 30.04.230.

46. Senator Robertson, Chairman of the Senate Committee on Banking and Currency, suggested by his comments in the 1956 debate on the Bank Holding Company Act that Congress may have intended to give the states more authority than merely to allow unrestricted entry of out-of-state bank holding companies. Senator Robertson suggested that states should be permitted to retain the authority to permit acquisitions by out-of-state bank holding companies in the limited case where a troubled bank might require financial assistance. 102 Cong. Record 6572 (1956).

APPENDIX D

Order of the Board of Governors of the Federal Reserve System Approving the Application of Hartford National Corporation to Acquire Arltru Bancorporation, Inc. (March 26, 1984)

FEDERAL RESERVE SYSTEM
Hartford National Corporation
Hartford, Connecticut

Order Approving Acquisition of a Bank Holding Company

Hartford National Corporation, Hartford, Connecticut ("HNC"), a bank holding company within the meaning of the Bank Holding Company Act of 1956, as amended (12 U.S.C. § 1841 *et seq.*) ("BHC Act"), has applied for the Board's approval under section 3(a)(3) of the Act (12 U.S.C. § 1842(a)(3)), to acquire Arltru Bancorporation, Lawrence, Masachusetts ("Arltru"), also a bank holding company, and thereby to acquire indirectly The Arlington Trust Company, Lawrence, Massachusetts.

Notice of this application, affording an opportunity for interested persons to submit comments, has been given in accordance with section 3(b) of the Act. The time for filing comments has expired and the Board has considered the application and all comments received in light of the factors set forth in section 3(c) of the Act (12 U.S.C. § 1842(c)), including the comments of Citicorp, New York, New York.

HNC, the second largest commercial banking organization in Connecticut, has consolidated assets of $5.9 billion.[1] Its sole subsidiary bank, The Connecticut National Bank ("CNB"), has deposits of $3.1 billion, representing 23.8 percent of the total deposits in commercial banks in the

1. Banking data are as of September 30, 1983.

state.[2] Arltru, which has total assets of $819 million and total deposits of $689 million, is the eighth largest bank holding company in Massachusetts. Arltru holds 2.4 percent of all deposits in commercial banks in Massachusetts.

Section 3(d) of the Act (12 U.S.C. 1842(d)), the Douglas Amendment, prohibits the Board from approving any application by a bank holding company to acquire any bank located outside of the state in which operations of the bank holding company's banking subsidiaries are principally conducted, unless such acquisition is "specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication." The statute laws of Massachusetts authorize the acquisition of a banking institution in Massachusetts by a bank holding company that controls a bank located in another New England state, if that other New England state authorizes on a reciprocal basis the acquisition of a bank in that state by a Massachusetts bank holding company.[3] Connecticut has passed such a reciprocal statute.[4]

The Massachusetts Board of Bank Incorporation has approved the proposed merger pursuant to these reciprocal Interstate Banking Acts, thus finding that the transaction

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2. These figures do not reflect the mergers of CNB with The Mattatuck Bank and Trust Company, Waterbury, Connecticut, or with the three subsidiary banks of First Bancorp, Inc., New Haven, Connecticut, which would increase CNB's deposits by approximately $825 million and make HNC the largest commercial banking organization in Connecticut, with 29 percent of the deposits in commercial banks in the state.

3. Mass. Ann. Laws Ch. 167A ("Massachusetts Interstate Banking Act"), § 2.

4. 1983 Conn. Acts 411 (Reg. Sess.) entitled "An Act Concerning Interstate Banking" ("Connecticut Interstate Banking Act"), § 2.

satisfies the reciprocity requirements of the respective statutes authorizing the interstate acquisition of banks. Based upon its review of the Massachusetts Interstate Banking Act, the Board concludes that Massachusetts has by statute expressly authorized a Connecticut bank holding company, such as HNC, to acquire a Massachusetts bank or bank holding company, such as Arltru. Thus, the Massachusetts Act meets the requirement of express authorization for intersate bank acquisitions imposed by section 3(d) of the Bank Holding Company Act.

Citicorp has protested this application and has challenged the constitutionality of the Massachusetts Interstate Banking Act, in particular, its provision that allows only New England bank holding companies[5] to acquire banks or bank holding companies located in Massachusetts.

The Board has stated that in the absence of clear and unequivocal evidence of the inconsistency of a state law with the United States Constitution, it will not hold the state statute to be unconstitutional.[6] In the Board's Order issued today with respect to the application of Bank of New England Corporation, Boston, Massachusetts, to merge with CBT Corporation, Hartford, Connecticut, the Board considered the validity of the Connecticut Interstate Banking Act under the Commerce Clause, Compact Clause, and Equal Protection Clause of the United States Constitution and did not find there to be clear and unequivocal evidence that the Connecticut statute was unconstitutional.

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5. New England bank holding companies include those located in Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont.

6. *Bank of New England Corporation,* Federal Reserve Board Order of March 26, 1984, *NCNB Corp.*, 68 Fed. Res. Bull. 54 (1982).

In language and effect, the challenged provisions of the Massachusetts statute parallel the provisions of the Connecticut Interstate Banking Act, and the legislative history of both acts confirms that the two states intended complementary statutes.[7] The Board thus believes that its reasoning with respect to the Connecticut Act's constitutionality applies directly to the Massachusetts Interstate Banking Act. Therefore, for the reasons set forth in detail in the Appendix to the Board's Order approving the application of Bank of New England Corporation, the Board concludes that the Massachusetts Interstate Banking Act is not unconstitutional. Accordingly, the Board will not deny this application on the grounds of unconstitutionality urged by Protestant.

In addition to determining that the merger of HNC and Arltru is expressly authorized by a valid statute, as required by section 3(d) of the Bank Holding Company Act, the Board must decide whether this acquisition is consistent with the statutory standards of section 3 of the Act. Arltru's single banking subsidiary, The Arlington Trust

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7. Massachusetts State Senator John A. Brennan, Jr., the primary sponsor of the Massachusetts Interstate Banking Act, stated, in testimony before the Connecticut Senate Banking Committee, that the proposed Connecticut bill bore a "remarkable similarity" to the Massachusetts Act. Transcript of Hearings before the Connecticut Joint Standing Committee on Banks, March 3, 1983, at 14. Further, the committee summary of the revised Senate bill that became the Massachusetts Interstate Banking Act stated that the purpose of the legislation was "to establish the necessary authority . . . for a regional, New England, banking system" and that the bill's revision was meant to "ensure that only New England based financial institutions can avail themselves of this authority." Massachusetts Joint Standing Committee on Banks & Banking, Research Staff Summary at 1 (November 9, 1982).

Company, operates in the Boston banking market,[8] the largest and the least concentrated of the banking markets in Massachusetts. Arltru is the sixth largest of sixty-four commercial banking organizations in the Boston market and controls 3.1 percent of the total deposits in commercial banks in that market.[9] Inasmuch as none of HNC's banking subsidiaries operates in Massachusetts and Arltru's banking subsidiary does not operate in Connecticut, the proposed transaction would not eliminate any significant existing competition in any relevant banking market. HNC does control a loan production office that operates in the Boston market, but it opened in April, 1983, and is not a significant competitor.

The Board has considered the effects of this proposal on probable future competition and has also examined the proposal in light of its proposed guidelines for assessing the competitive effects of market-extension mergers or acquisitions.[10] In evaluating the effects of a proposal on probable future competition, the Board considers market concentration, the number of probable future entrants into

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8. The Boston banking market includes all of Suffolk and Essex Counties, most of Middlesex, Norfolk, and Plymouth Counties, and small parts of Bristol and Worcester Counties. The market extends over the entire eastern coast of Massachusetts, excluding Cape Cod, and also includes 13 towns in southern New Hampshire.

9. Market deposit data are as of June 30, 1982. Over 200 thrift institutions compete in the market. Arltru is the tenth largest depository institution in the market and it controls only 1.4 percent of all deposits in financial institutions in the market.

10. "Proposed Policy Statement of the Board of Governors of the Federal Reserve System for Assessing Competitive Factors under the Bank Merger Act and the Bank Holding Act," 47 *Federal Register* 9017 (March 3, 1982). Although the proposed policy statement has not been adopted by the Board, the Board is using the policy guidelines in its analysis of the effects of a proposal on probable future competition.

the market, the size of the bank to be acquired, and the attractiveness of the market for entry on a *de novo* or foothold basis absent approval of the acquisition. After consideration of these factors in the context of the specific facts of this case, the Board concludes that consummation of this proposal would not have any significant adverse effects on probable future competition in any relevant market.

The record shows that the Boston banking market, in which Arltru operates, is not highly concentrated. In view of this consideration and other facts of record, the Board concludes that elimination of HNC as a probable future entrant into the Boston market would not have a substantial anticompetitive effect in that market. HNC's banking subsidiaries operate in the ten Connecticut banking markets.[11] There are numerous probable future entrants into nine of these markets, since bank holding companies located in Rhode Island and Massachusetts are now eligible for entry. The tenth market is not highly concentrated.

Based on the foregoing and other facts of record, the Board concludes that consummation of the proposed acquisition of Arltru's banking subsidiary would not have any significant adverse effects on existing or probable future competition and would not increase the concentration of banking resources in any relevant area.

The financial and managerial resources of HNC and Arltru are considered satisfactory and their prospects appear favorable. HNC has made a commitment, as a part of this transaction, to increase the capital of Arltru's sub-

11. The ten Connecticut banking markets are Hartford, New Haven, Bridgeport, Waterbury, New London, Danbury, Torrington, Danielson, Willimantic, and Old Saybrook.

sidiary, The Arlington Trust Company. The Board considers financial considerations to be positive.

With respect to convenience and needs considerations, both HNC and Arltru have a satisfactory record of Community Reinvestment Act compliance. Consummation of this merger would permit Arltru to provide additional credit capacity to serve more and larger commercial customers. HNC also proposes to expand The Arlington Trust Company's trust department as well as its mortgage lending, municipal financing, and commercial banking services. The considerations related to the convenience and needs of the communities to be served weigh in favor of approval.

Based on the foregoing and other facts of record, the Board concludes that the proposed acquisition is in the public interest and that the application should be and hereby is approved. The acquisition shall not be made before the thirtieth calendar day following the effective date of this Order or later than three months after the effective date of this Order, unless such period is extended for good cause by the Board or by the Federal Reserve Bank of Boston, pursuant to delegated authority.

By order of the Board of Governors,[12] effective March 26, 1984.

(signed) JAMES MCAFEE

JAMES MCAFEE
Associate Secretary of the Board

[SEAL]

12. Voting for this action: Chairman Volcker and Governors Martin, Wallich, Partee, Teeters, Rice, and Gramley.

APPENDIX E

Order of the Board of Governors of the Federal Reserve System Approving the Application of Bank of Boston Corporation to Acquire Colonial Bancorp, Inc. (May 18, 1984)

FEDERAL RESERVE SYSTEM
Bank of Boston Corporation
Boston, Massachusetts

Order Approving Acquisition of a Bank Holding Company and Companies Engaged in Mortgage Banking and Leasing Activities

Bank of Boston Corporation, Boston, Massachusetts, a bank holding company within the meaning of the Bank Holding Company Act of 1956, as amended (12 U.S.C. § 1841 *et seq.*) ("Act"), has applied for the Board's approval under section 3(a)(5) of the Act (12 U.S.C. § 1842-(a)(5)), to acquire the successor by merger to Colonial Bancorp, Inc., Waterbury, Connecticut ("Colonial"), also a bank holding company, and thereby to acquire Colonial Bank, Waterbury, Connecticut. In addition, Applicant has applied for the Board's approval under section 4(c)(8) of the Act (12 U.S.C. § 1843(c)(8)) and section 225.23(a)(2) of the Board's Regulation Y (12 C.F.R. § 225.23(a)(2)) to acquire Colonial's nonbanking subsidiaries: Colbanc Realty Corporation, Waterbury, Connecticut ("Realty"), which engages in mortgage banking activities, and Colbanc Leasing Corporation, Waterbury, Connecticut ("Leasing"), which leases personal property. These activities have been determined by the Board to be closely related to banking and permissible for bank holding companies (12 C.F.R. § 225.25(b)(1) and (5)).

Notice of these applications, affording an opportunity for interested persons to submit comments, has been given in accordance with sections 3 and 4 of the Act (49 *Federal Register* 6012 (1984)). The time for filing comments has expired, and the Board has considered the applications and all comments received in light of the factors set forth in section 3(c) of the Act (12 U.S.C. § 1842(c)) and the considerations set forth in section 4(c)(8) of the Act, including the comments of Citicorp, New York, New York, challenging the constitutionality of the Connecticut statute under which the proposed acquisition is to be made.

Applicant, with the nine banking subsidiaries, is the largest commercial banking organization in Massachusetts and New England and has consolidated assets of $19.5 billion and total domestic deposits of $5.9 billion, representing 20.2 percent of the total deposits in commercial banks in Massachusetts.[1] Colonial, the fourth largest commercial banking organization in Connecticut, has total assets of $1.4 billion and total domestic deposits of $1.2 billion, representing 8.0 percent of total deposits in commercial banks in Connecticut. Upon consummation of the proposed transaction, Applicant would remain the largest bank holding company in New England in terms of both assets and domestic deposits.

Applicant's nine banking subsidiaries operate in ten of the fourteen Massachusetts banking markets,[2] as well as in the Massachusetts portion of the Providence, Rhode Island, banking market. Colonial's sole banking subsidiary operates in seven of the ten Connecticut banking markets.[3] In-

1. Banking data are as of December 31, 1983.

2. These Massachusetts banking markets are Boston, Springfield, Worcester, New Bedford, Fall River, Cape Cod, Fitchburg-Leominster, Pittsfield, Greenfield, and Amherst-Northampton.

3. These Connecticut banking markets are Hartford, New Haven, Bridgeport, Waterbury, Danbury, Torrington, and Salisbury.

asmuch as none of Applicant's banking subsidiaries operates in Connecticut and Colonial's banking subsidiary does not operate in Massachusetts, the proposed transaction would not eliminate any significant existing competition in any relevant banking market.

The Board has considered the effects of this proposal on probable future competition and also has examined the proposal in light of the Board's proposed guidelines for assessing the competitive effects of market-extension mergers or acquisitions.[4] In evaluating the effects of a proposal on probable future competition, the Board considers market concentration, the number of probable future entrants into the market, the size of the bank to be acquired, and the attractiveness of the market for entry on a *de novo* or foothold basis absent approval of the acquisition. After consideration of these factors in the context of the specific facts of this case, the Board concludes that consummation of this proposal would not have any significant adverse effects on probable future competition in any relevant market.

With respect to the seven banking markets in Connecticut in which Colonial operates, the record shows that there are numerous other probable future entrants into these markets. At least nine commercial banking organizations with assets over $1 billion, including five in Massachusetts (other than Applicant) and three in Rhode Island, can be identified as probable future entrants into the seven relevant Connecticut banking markets. In addition, in three of the seven markets (Bridgeport, New Haven, and Danbury), the market is not highly concentrated and in two other markets (Hartford and Salisbury), Colonial is not a

4. 47 *Federal Register* 9017 (March 3, 1982). Although the proposed policy statement has not been adopted by the Board, the Board is using the policy guidelines in its analysis of the effects of a proposal on probable future competition.

market leader. In view of these considerations and other facts of record, the Board concludes that elimination of Applicant as a probable future entrant into markets served by Colonial would not have a substantial anticompetitive effect in those markets.

With respect to the ten Massachusetts banking markets in which Applicant operates, two of these markets (Boston and Cape Cod) are not highly concentrated. With respect to the eight other relevant markets, the record discloses a minimum of nine commercial banking organizations, including four in Connecticut (other than Colonial) and three in Rhode Island, as probable future entrants into each of the markets.[5] On the basis of these considerations and other facts of record, the Board concludes that the elimination of Colonial as a probable future entrant would not have a substantial anticompetitive effect in the ten Massachusetts markets served by Applicant.

The financial and managerial resources of Applicant and Colonial are regarded as generally satisfactory, and their prospects appear favorable. Considerations relating to the convenience and needs of the communities to be served also are consistent with approval of the application.

Section 3(d) of the Act prohibits the Board from approving any application by a bank holding company to acquire any bank located outside of the state in which the operations of the bank holding company's banking subsidiaries are principally conducted, unless such acquisition is "specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication." (12 U.S.C. § 1842(d)). Based

5. Applicant has less than a 1 percent market share in the Providence, Rhode Island, banking market. Accordingly, the proposed merger's effect upon probable future competition in this market would be insignificant.

upon its review of the Connecticut interstate banking statute,[6] the Board concludes that Connecticut has by statute expressly authorized, within the meaning of the Douglas Amendment, a Massachusetts bank holding company, such as Applicant, to acquire a Connecticut bank or bank holding company, such as Colonial.[7]

This application raises a question under the United States Constitution concerning the constitutionality of a provision of the Connecticut interstate banking statute that excludes bank holding companies located outside of New England from acquiring banks in Connecticut.[8] The Board addressed the constitutionality of the Connecticut law in its Order approving the application of Bank of New England Corporation, Boston, Massachusetts, to acquire a bank in Connecticut.[9] After review of the record and in reliance on a detailed analysis of the constitutional issues included in an Appendix to the Board's order, the Board concluded that, while the issue is not free from doubt, there is no clear and unequivocal basis for a determination that the Connecticut statute is inconsistent with the Constitution.[10]

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6. 1983 Conn. Acts 411 (Reg. Sess.) entitled "An Act Concerning Interstate Banking," § 2.

7. *See Bank of New England Corporation*, 70 Federal Reserve Bulletin 374, 375 (1984).

8. New England bank holding companies include those located in Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont.

9. *Bank of New England Corporation, supra.* The Board addressed the constitutionality of a similar provision in Massachusetts law in approving the application of Hartford National Corporation, Hartford, Connecticut, to acquire a Massachusetts bank. *Hartford National Corporation*, 70 Federal Reserve Bulletin 353 (1984).

10. It is the Board's policy that it will not hold a state law unconstitutional in the absence of clear and unequivocal evidence of the inconsistency of the state law with the United States Constitution. *See NCNB Corp.*, 68 Federal Reserve Bulletin 54, 56 (1982); *Bank of New England Corporation, supra*, 70 Federal Reserve Bulletin at 376.

Subsequent to the Board's approval of those applications, the protestants petitioned for judicial review of the Board's orders on the sole ground that the Connecticut and Massachusetts interstate banking laws are unconstitutional.[11] While the court has expedited its review of those cases, the court has not yet issued an opinion regarding the merits of the protestants' claims. In the absence of a judicial determination regarding the constitutionality of the Connecticut interstate banking statute, the Board believes that it is appropriate in this case to apply the analysis articulated in the Bank of New England and Hartford National Corporation cases. Accordingly, on the basis of the Board's finding in those cases regarding the Connecticut statute, the Board has determined not to deny Bank of Boston Corporation's application on the grounds urged by the protestant that the Connecticut statute is unconstitutional.

In addition to seeking judicial review, the protestants in the Bank of New England and Hartford National Corporation cases petitioned the court to stay the effectiveness of the Board's orders pending judicial review. On April 24, 1984, the court granted the protestants' motions to stay the effectiveness of the Board's orders. In view of this action by the court, the Board has considered whether to stay the effectiveness of its action in this case pending the outcome of the litigation regarding the constitutionality of the Connecticut statute. The protestant in this case has not requested a stay, and under 5 U.S.C. § 705, the Board may not be authorized to stay its action absent a petition for

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11. *Northeast Bancorporation, Inc.* v. *Board of Governors of the Federal Reserve System*, No. 84-4047 (2d Cir. filed March 27, 1984); *Citicorp* v. *Board of Governors of the Federal Reserve System*, Nos. 84-4051 and 84-4053 (2d Cir. filed March 30, 1984).

judicial review. Consequently, the Board has determined not to stay, on its own motion, the effectiveness of its decision in this case at this time.

Applicant has also applied, under section 4(c)(8) of the Act, to acquire two nonbanking subsidiaries of Colonial—Realty and Leasing. Neither of these subsidiaries conducts any business in Massachusetts. Two of Applicant's existing subsidiaries, FNB Financial Company, Boston, Massachusetts ("FNB"), and Firstbank Financial Corporation, Boston, Massachusetts ("Firstbank"), operate in Connecticut. FNB, which engages in commercial finance activities, derives $19.0 million in accounts receivable and inventory loans from Connecticut, representing only 0.4 percent of Applicant's total commercial loans. Firstbank, which engages in leasing activities, has lease balances outstanding from Connecticut customers of only $8 million, representing 4 percent of its lease portfolio.

The Board believes that this proposal would have only a minimal impact on existing competition among the nonbanking subsidiaries of Applicant and Colonial. Moreover, this proposal would have no significant effect on existing competition between Colonial's subsidiary bank and FNB. Given the limited scope of the activities of Applicant's nonbanking subsidiaries in Connecticut, the Board concludes that this transaction would not have any significant adverse effect on competition.

There is no evidence in the record to indicate that approval of this proposal would result in undue concentration of resources, unfair competition, conflicts of interest, unsound banking practices, or other adverse effects. Accordingly, the Board has determined that the balance of the public interest factors it must consider under section

4(c)(8) of the Act is favorable and consistent with approval of the applications to acquire these nonbanking subsidiaries.

Based on the foregoing and other facts of record, the Board has determined that the applications under sections 3 and 4 of the Act should be and hereby are approved. The acquisition of Colonial's bank subsidiary shall not be consummated before the thirtieth calendar day following the effective date of this Order or later than three months after the effective date of this Order, unless such period is extended for good cause by the Board or by the Federal Reserve Bank of Boston, pursuant to delegated authority. The approval of Applicant's proposal to acquire Colonial's nonbanking activities is subject to the conditions set forth in Regulation Y, including sections 225.4(d) and 225.23 (b)(3) (12 C.F.R. §§ 225.4(d) and 225.23(b)(3)), and to the Board's authority to require such modification or termination of the activities of a holding company or any of its subsidiaries as the Board finds necessary to assure compliance with the provisions and purposes of the Act and the Board's regulations and orders issued thereunder, or to prevent evasion thereof.

By order of the Board of Governors,[12] effective May 18, 1984.

(signed) James McAfee

James McAfee
Associate Secretary of the Board

[SEAL]

12. Voting for this action: Chairman Volcker and Governors Partee, Teeters, Rice, and Gramley. Absent and not voting: Governors Martin and Wallich.

APPENDIX F

Order of the United States Court of Appeals for the Second Circuit Staying Its Mandate and Maintaining the Status Quo (August 9, 1984)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket Number 84-4047, 4051, 4053, 4081

NORTHEAST BANCORP, INC., et al.

Petitioner,

—against—

THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

Respondent.

NOTICE OF MOTION

for *Stay of Mandate and Maintenance of Status Quo*

Brief statement of the relief requested:

Stay of Mandate and Maintenance of Status Quo Pending Disposition by the Supreme Court.

ORDER

IT IS HEREBY ORDERED that the motion

be and it hereby is granted ~~denied~~.

George C. Pratt

Dudley B. Bonsal

Date—August 9, 1984

APPENDIX G

Order of the United States Court of Appeals for the Second Circuit Denying Motion to Vacate Order of the Board of Governors of the Federal Reserve System Staying Board's Approval of Bank of Boston Corporation Application (June 19, 1984)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket Number 84-4081

CITICORP, a Corporation,

Petitioner,

—against—

THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

Respondent.

NOTICE OF MOTION

To Vacate Stay

Brief statement of the relief requested:

Bank of Boston Corporation ("BBC") requests that the Court vacate the order issued by the Board of Governors of the Federal Reserve System ("the Board") staying the effectiveness pending judicial review of its prior order approving BBC's acquisition of Colonial Bancorp, Inc. ("Colonial").

ORDER

IT IS HEREBY ORDERED that the motion ~~granted~~ denied.

Richard J. Cardamone

George C. Pratt

Dudley B. Bonsal

Date—June 19, 1984

APPENDIX H

Order of the Board of Governors of the Federal Reserve System Staying the Board's Order Approving Bank of Boston Corporation Application (June 11, 1984)

FEDERAL RESERVE SYSTEM

Bank of Boston Corporation

Boston, Massachusetts

Stay of Board's Order Approving Acquisition of a Bank Holding Company

By Order dated May 18, 1984, the Board approved the application of Bank of Boston Corporation, Boston, Massachusetts, to acquire Colonial Bancorp, Inc., Waterbury, Connecticut, and thereby to acquire Colonial Bank, Waterbury, Connecticut. The Board's approval of this interstate acquisition of a bank was made possible by the Connecticut statute authorizing, under certain conditions, the acquisition of Connecticut banks by bank holding companies located in other New England states.[1]

Citicorp, New York, New York, protested the application in a timely manner on the basis that the Connecticut interstate banking statute unconstitutionally discriminates againt non-New England bank holding companies. Citicorp has sought judicial review of the Board's Order by the United States Court of Appeals for the Second Circuit. It has also petitioned the Board to stay its Order pending resolution by the Second Circuit Court of Appeals of the constitutional issues raised by the Connecticut statute.

On March 26, 1984, the Board approved two other New England interstate transactions[2] despite protests from

1. 1983 Conn. Acts 411 (Res. Sess.) entitled "An Act Concerning Interstate Banking," § 2.

2. Bank of New England Corporation, Boston, Massachusetts, to merge with CBT Corporation, Hartford, Connecticut, 70 Federal Reserve Bulletin 374 (1984), and Hartford National Corporation, Hartford, Connecticut, to acquire Arltru Bancorporation, Lawrence, Massachusetts, 70 Federal Reserve Bulletin 354 (1984).

Citicorp and other protestants that raised constitutional issues identical to the issue in this case. The protestants sought judicial review of the Board's Orders in the previous cases before the United States Court of Appeals for the Second Circuit,[3] and on April 24, 1984, that Court stayed the effectiveness of the Board's Orders pending the Court's decision on the merits of the cases. In view of the decision of the Court of Appeals to stay the Board's prior Orders and the fact that this case raises the same substantive issues, and considering the factors relevant to a decision on a stay motion, the Board believes that the interests of administrative and judicial efficiency as well as considerations of fairness require the Board to grant the petition of Citicorp and to stay its Order approving the application of Bank of Boston Corporation to acquire Colonial Bancorp, Inc.

Accordingly, the Board hereby stays the effectiveness of its Order approving the application of Bank of Boston Corporation to acquire Colonial Bancorp, Inc., pending judicial review of this case by the United States Court of Appeals for the Second Circuit.

By order of the Board of Governors,[4] effective June 11, 1984.

(signed) JAMES MCAFEE

JAMES MCAFEE
Associate Secretary of the Board

[SEAL]

3. *Northeast Bancorporation, Inc.* v. *Board of Governors of the Federal Reserve System*, No. 84-4047 (2d Cir. filed March 27, 1984); *Citicorp* v. *Board of Governors of the Federal Reserve System*, Nos. 84-4051 and 84-4053 (2d Cir. filed March 30, 1984).

4. Voting for this action: Chairman Volcker and Governors Partee, Rice, and Gramley. Absent and not voting: Governors Martin, Wallich, and Teeters.

APPENDIX I

Order of the United States Court of Appeals for the Second Circuit Staying Board's Orders Approving Bank of New England and Hartford National Corporation Applications (April 24, 1984)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket Number 84-4047

NORTHEAST BANCORP, INC. and UNION TRUST COMPANY,
Petitioner,

—against—

THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
Respondent.

NOTICE OF MOTION

for *Stay of Respondent's Order*

Brief statement of the relief requested:

Petitioners request a stay of the order of the Board of Governors of the Federal Reserve System pending final determination of their constitutional challenges to the order.

ORDER

IT IS HEREBY ORDERED that the motion *granted* ~~denied~~. The record and briefs and joint appendix of the parties shall be personally exchanged and filed on or before May 4, 1984. The appeal shall be heard by the PM panel sitting during the week of May 7, 1984. The oral application by Hartford for relief from the stay is denied.

ELAINE B. GOLDSMITH, Clerk

by /s/

Edward J. Guardaro, Deputy Clerk

Hon. Irving R. Kaufman,

Hon. Thomas J. Meskill, CJJ.

Date—April 24, 1984

APPENDIX J
Order of the United States Court of Appeals for the Second Circuit Granting Northeast Bancorp, Inc. and Union Trust Company Leave to Intervene (April 23, 1984)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket Number 84-4053

CITICORP, a corporation,

Petitioner,

—against—

THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

Respondent.

NOTICE OF MOTION

for *Leave to Intervene*

Brief statement of the relief requested:

Leave to intervene in the above-captioned matter.

ORDER

IT IS HEREBY ORDERED that the motion

be and it hereby is granted ~~denied~~

IRVING R. KAUFMAN

Date—4/23/84

APPENDIX K

The Commerce and Compact Clauses of the United States Constitution

Art. I, § 8, cl. 3:

> The Congress shall have Power . . .
> To regulate commerce . . . among the several states . . . .

Art. I, § 10, cl. 3:

> No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State . . . .

APPENDIX L

The Douglas Amendment, 12 U.S.C. § 1842(d)

Limitation by State Boundaries

(d) Notwithstanding any other provision of this section, no application (except an application filed as a result of a transaction authorized under section 13(f) of the Federal Deposit Insurance Act) shall be approved under this section which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank located outside of the State in which the operations of such bank holding company's banking subsidiaries were principally conducted on July 1, 1966 or the date on which such company became a bank holding company, whichever is later, unless the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication. For the purposes of this section, the State in which the operations of a bank holding company's subsidiaries are principally conducted is that State in which total deposits of all such banking subsidiaries are largest.

APPENDIX M

The Connecticut Act, 1983 Conn. Act 83-411 (Reg. Sess.) (enacted June 8, 1983)

AN ACT CONCERNING INTERSTATE BANKING.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

Section 1. (NEW) For purposes of sections 1 to 17, inclusive, of this act and unless the context otherwise requires:

(a) "Bank" has the same meaning given to that term in 12 U.S.C. Section 1841(c);

(b) "Bank holding company" has the same meaning given to that term in 12 U.S.C. Section 1841(a);

(c) "Commissioner" means the banking commissioner;

(d) "Connecticut bank" means any federally or state chartered bank which has its main office and principal place of business in Connecticut and is not directly or indirectly owned or controlled by any bank, savings bank, savings and loan association or bank holding company other than a Connecticut or New England bank, savings bank, savings and loan association or bank holding company;

(e) "Connecticut bank holding company" means any bank holding company: (1) Which has its principal place of business in Connecticut; (2) each of whose subsidiary banks has its main office and principal place of business only in Connecticut or the state of Maine, Massachusetts, New Hampshire, Rhode Island or Vermont; and (3) which is not directly or indirectly owned or controlled by a bank holding com-

pany which (A) has its principal place of business in any state other than Connecticut or the state of Maine, Massachusetts, New Hampshire, Rhode Island, or Vermont or (B) owns or controls any subsidiary bank that has its main office or principal place of business in any state other than such states;

• • •

(h) "Control" has the same meaning given to that term in 12 U.S.C. Section 1841(a);

(i) "New England bank" means any federally or state chartered bank which has its main office and principal place of business in the state of Maine, Massachusetts, New Hampshire, Rhode Island or Vermont and is not directly or indirectly owned or controlled by any bank, savings bank, savings and loan association or bank holding company other than a Connecticut or New England bank, savings bank, savings and loan association or bank holding company;

(j) "New England bank holding company" means a bank holding company: (1) Which has its principal place of business in the state of Maine, Massachusetts, New Hampshire, Rhode Island or Vermont; (2) each of whose subsidiary banks has its main office and principal place of business only in Connecticut or the state of Maine, Massachusetts, New Hampshire, Rhode Island or Vermont; and (3) which is not directly or indirectly owned or controlled by a bank holding company which (A) has its principal place of business in any state other than Connecticut or the state of Maine, Massachusetts, New Hampshire, Rhode Island or Vermont, or (B) owns or controls any subsidiary bank which has its main office or principal place of business in any state other than such states;

• • •

(m) "Subsidiary" has the same meaning given to that term in 12 U.S.C. Section 1841(d).

Sec. 2. (NEW) Any New England bank holding company may, with the approval of the commissioner, establish or acquire and retain direct or indirect ownership or control of all or part of the voting stock of any Connecticut bank, Connecticut savings bank, Connecticut savings and loan association or Connecticut bank holding company, if the laws of the state in which the operations of the subsidiary banks of such New England bank holding company are principally conducted, within the meaning of 12 U.S.C. Section 1842(d), expressly authorize, under conditions no more restrictive than those imposed by the laws of Connecticut as determined by the commissioner, the establishment or acquisition and retention of direct or indirect ownership or control of all or part of the voting stock of banks, savings banks, savings and loan associations or bank holding companies having their principal places of business in such state by Connecticut bank holding companies. Any such establishment or acquisition by a New England bank holding company shall be effected in accordance with the laws of this state applicable to such activities, when conducted by Connecticut bank holding companies. If such New England bank holding company, by virtue of any action, ceases to be a New England bank holding company as defined in section 1 of this act, and it does not become a Connecticut bank holding company, as defined in section 1 of this act, the commissioner shall order such bank holding company to immediately divest itself of its direct or indirect ownership or control of the stock of any Connecticut bank, savings bank, savings and loan association or bank holding company acquired by it pursuant to this section.

Sec. 3. (NEW) A New England bank may, with the approval of the commissioner, purchase and retain direct or

indirect ownership or control of the stock of any Connecticut bank, Connecticut savings bank or Connecticut savings and loan association if the laws of the state in which such New England bank has its principal place of business expressly authorize, under conditions no more restrictive than those imposed by the laws of Connecticut as determined by the commissioner, the purchase and retention of direct or indirect ownership or control of the stock of any bank, savings bank or savings and loan association which has its principal place of business in such state by a Connecticut bank. Any such purchase shall be effected in accordance with the laws of this state applicable to such a purchase if made by a Connecticut bank. If such New England bank, by virtue of any action, ceases to be a New England bank, as defined in section 1 of this act, and it does not become a Connecticut bank, as defined in section 1 of this act, the commissioner shall order such bank to immediately divest itself of its direct or indirect ownership or control of the stock of any Connecticut bank, Connecticut savings bank or Connecticut savings and loan association acquired by it pursuant to this section.

* * *

APPENDIX N

The Massachusetts Act, Mass. Gen. Laws Ann. Ch. 167A § 2 (enacted December 31, 1982)

§ 2. Board of bank incorporation; acts requiring approval by board

Except with the prior written approval of the board of bank incorporation (1) no company shall become a bank holding company; (2) no bank holding company owning, controlling or holding with power to vote, directly or indirectly, twenty-five per centum or more of the voting stock of each of two or more banking institutions or, in the case of a bank holding company which is itself a banking institution, owning, controlling or holding with power to vote, directly or indirectly, twenty-five per centum or more of the voting stock of one or more banking institutions shall acquire direct or indirect ownership or control of any additional voting stock in any such banking institution or shall acquire direct or indirect ownership or control of any voting stock in any other banking institution if, after such acquisition, such bank holding company will, directly or indirectly, own or control more than five per centum of the voting stock thereof; (3) no bank holding company or affiliate thereof, other than a banking institution, shall acquire all or substantially all of the assets of a banking institution; (4) no bank holding company shall merge or consolidate with any other bank holding company; and (5) no bank holding company shall vote stock which it controls in a banking institution.

Notwithstanding the provisions of this section, an out-of-state bank holding company, with the prior written approval of the board of bank incorporation, may establish

or acquire direct or indirect ownership or control of more than five per cent of the voting stock of one or more banking institutions or bank holding companies; provided that the laws of the state in which operations of the subsidiary banks of such out-of-state bank holding company are principally conducted expressly authorized, under conditions no more restrictive than those imposed by the laws of the commonwealth as determined by the commissioner, the establishment or the acquisition of direct or indirect ownership or control of more than five per cent of the voting stock of banks, or companies controlling one or more banks in that state, by bank holding companies whose banking institutions principally conduct their operations in the commonwealth. Any such establishment or acquisition by an out-of-state bank holding company shall be effected in accordance with the laws of the commonwealth which are applicable to such activities carried out by bank holding companies. For the purposes of this section, the term "out-of-state bank holding company" shall have the same meaning as set forth in the Bank Holding Company, Act of 1956 (12 USC 1841 et seq.), but shall include only those companies which have their principal places of business in one of the states of Connecticut, Maine, New Hampshire, Rhode Island or Vermont and which are not directly or indirectly controlled, within the meaning set forth in said Bank Holding Company Act, by another corporation which has its principal place of business in a state other than the commonwealth or one of the states referred to above.

APPENDIX O

The Rhode Island Act, R.I. Pub. Law S. 0661 Sub. A (enacted May 17, 1983)

SECTION 1. Title 19 of the general laws entitled "Financial Institutions" is hereby amended by adding thereto the following Chapter 30:

CHAPTER 30

ACQUISITIONS BY OUT-OF-STATE BANKS AND BANK HOLDING COMPANIES

19-30-1. Definitions of Terms.—(a) The terms "bank", "bank holding company", "company" and "subsidiary" shall have the meanings set forth in the federal "Bank Holding Company Act of 1956", as amended, 12 U.S.C. Sec. 1841 et seq., except that "bank" shall also include a savings bank, building-loan association, and savings and loan association, whether organized with or without capital stock.

(b) The term "Rhode Island bank" shall mean a bank, whose principal office is located in this state.

(c) The term "out-of-state bank" shall mean a bank whose principal office is located (i) on and after the effective date of this act until July 1, 1986, in one of the New England states other than this state and which is not directly or indirectly controlled by another company, the operations of whose bank subsidiaries are not principally conducted in Rhode Island or one of the other New England states and (ii) on and after July 1, 1986 in any other state.

(d) The term "Rhode Island bank holding" shall mean a bank holding company which controls a Rhode Island

bank, provided that an out-of-state bank holding company which acquired control of one or more Rhode Island banks pursuant to section 19-30-2 shall not be deemed to be a Rhode Island bank holding company, unless operations of its bank subsidiaries are principally conducted in this state.

(e) The term "out-of-state bank holding company" shall mean a holding company, other than a Rhode Island bank holding company, the operations of the bank subsidiaries of which are principally conducted (i) on and after the effective date of this act until July 1, 1986 in one of the New England states other than this state, and which is not directly or indirectly controlled by another company, the operations of whose bank subsidiaries are not principally conducted in Rhode Island or one of the other New England states, and (ii) on and after July 1, 1986 in any other state.

(f) For the purposes of this act, the state in which operations of a bank holding company's bank subsidiaries are principally conducted is the state in which total deposits of all of its bank subsidiaries are the largest.

(g) The term "New England States" shall mean the Commonwealth of Massachusetts and the states of Maine, New Hampshire, Vermont, Connecticut and Rhode Island.

19-30-2. Acquisitions authorized.—The provisions of subsection (a) of this section 19-30-2 shall expire and be of no further force and effect as of July 1, 1985. The provisions of subsection (b) of this section 19-30-2 shall be effective as of July 1, 1985.

(a) An out-of-state bank or bank holding company may acquire direct or indirect ownership or control of more

than five percent of the voting stock of one or more Rhode Island banks or bank holding companies, if the following three conditions are met:

(i) The laws of the state in which such out-of-state bank is located or in which operations of the bank subsidiaries of such out-of-state bank holding company are principally conducted expressly authorize, under conditions no more restrictive that [*sic*] those imposed by the laws of Rhode Island, as determined by the board of bank incorporation, the acquisition by a Rhode Island bank holding company or a Rhode Island bank of direct or indirect ownership or control of more than five percent of the voting stock of banks located in such state or bank holding companies, the operations of the bank subsidiaries of which are principally conducted in such state.

(ii) such acquisition, including all of the terms and conditions thereof, shall have been approved in advance by (A) the affirmative vote of the holders of shares of capital stock representing at least two-thirds (or such greater percentage as may be required by the articles of incorporation or by-laws of such Rhode Island bank or bank holding company) of the outstanding voting power of such Rhode Island bank or bank holding company or (B) by 80% of the members of the board of directors (or such other applicable governing body) of such Rhode Island bank or bank holding company; and

(iii) such acquisition, including all of the terms and conditions thereof, shall have been approved in advance by the board of bank incorporation, which shall have issued a written order evidencing such approval. In determining whether to approve a proposed acquisition by

an out-of-state bank or bank holding company, the board of bank incorporation shall consider, in addition to such other factors as it may in its discretion determine, whether such acquisition shall promote the safety and soundness of the institution whose voting stock is to be acquired and the needs and convenience of the communities served by such institution. The procedures for notice and the conducting of hearings by the board of bank incorporation and the rights of appeal from decisions of such board shall be governed by the Rhode Island Administrative Procedure Act, Title 42, Chapter 35. Any Rhode Island bank or Rhode Island bank holding company which is the subject to an acquisition hereunder shall be a party to the proceedings of the board of bank incorporation and shall be entitled to seek judicial review of any final decision of such board.

(b) An out-of-state bank or bank holding company may acquire direct or indirect ownership or control of more than five percent of the voting stock of one or more Rhode Island banks or bank holding companies, provided that the laws of the state in which such out-of-state bank is located or in which operations of the bank subsidiaries of such out-of-state bank holding company are principally conducted expressly authorize, under conditions no more restrictive than those imposed by the laws of Rhode Island as determined by the board of bank incorporation, the acquisition by a Rhode Island bank holding company or a Rhode Island bank of direct or indirect ownership or control or more than five percent of the voting stock of banks located in such state or bank holding companies, the operations of the bank subsidiaries of which are principally conducted in such state.

* * *

APPENDIX P

The Congressional Record (Excerpts)
House, June 14, 1955

[Pages 8180-81]

MR. KEATING. I am always rather leery when I see in any bill provisions granting exceptions. Whenever any bill says that it is not to apply in certain instances, that should always put us on guard. In the bill before us, on page 10, section 6, subsection (c), we have a long list of instances in which prohibitions are not to apply. It is all very general language, but it always occurs to me that there may have been behind the scenes somewhere some effort made to employ such general language to achieve an objective specific in its application. Obviously we could not put in here any exception for banks in any one locality or region, but neither should we do by indirection what we would properly shrink from doing directly. I wonder if in the gentleman's substitute he has any such extensive exceptions as those listed beginning on page 10 under subsection (c).

MR. WOLCOTT. I have none of the exceptions to which the gentleman refers.

MR. KEATING. It seems to me that should commend it to our favorable consideration.

* * *

MR. KEATING. It strikes me that if we are going to enact a bill, which I think we need, we should enact one that applies throughout the Nation and equally to all institutions.

Mr. McDonough. That is exactly what the substitute bill does. These exceptions were inserted in this bill for the special convenience of those holding corporations whose names I have recited.

Mr. Brown of Ohio. Mr. Chairman, I rise in support of the amendment.

Mr. Chairman, when the Committee on Banking and Currency appeared before the Committee on Rules seeking a rule on this bill to send it to the floor, many of us were especially impressed by the fact that no two members of the legislative committee seemed to agree on what the provisions of this particular bill were or how they would apply. Grave questions arose in the Committee on Rules during the hearing as to whether or not this bill did not grant such exemptions as to favor the banks and financial institutions and holding companies in certain States and to work hardship on similar institutions in other States.

We were also impressed by the fact, as it was developed before the Committee on Rules, that the Federal Reserve Board, the Comptroller of the Currency, and the Federal Deposit Insurance Corp., all of whom were referred to in the report, had not approved the particular measure but instead had approved the so-called original Robertson bill as introduced in the Senate, which now constitutes the substitute or the amendment now before us. In other words, the Federal Reserve Board, the Comptroller of the Currency, and the Federal Deposit Insurance Corp. officials all found that the special amendment before us as a substitute to that bill does protect the interests of all concerned equally, everywhere in the United States, without favoritism to any, and is the type of legislation that would accomplish a worthwhile objective as described in this bill.

Therefore, it seems to me, Mr. Chairman, that if we want to enact legislation here that will not discriminate against some and in favor of others; if we want to enact legislation that meets the approval of those organizations or regulatory bodies within our Government in the executive branch charged with directing the activities of banks and other financial institutions, of examining and checking them to make sure that the rights of depositors and the rights of stockholders and the rights of the general public are fully and properly protected, then this particular substitute or amendment must be adopted. Certainly none of us here are qualified to pass upon all of the technical requirements of law affecting the banking institutions of this great country of ours. Certainly we should depend to a great extent upon the advice of these regulatory agencies I have just mentioned. Certainly we do want to enact legislation that will correct some of the abuses that have been mentioned such as those which now exist in Florida and are exempt under this law, and such as those that exist in Atlanta and Louisville and are exempt under the provisions of the bill we are now attempting to amend.

[Page 8184]

Mr. Smith. Let us consider the bill from the committee, then let us operate on that from the standpoint of amendments to correct things we do not like. For instance, I do not like the idea of exempting savings banks. I do not know why they are exempted in the bill. Nobody has told me. I do not like the exemptions. Let us treat everybody alike. I can see, though, that it is pretty hard for this Congress to say to an individual: Mr. Bailey, you cannot own a

certain amount of stock in the bank in your town and also own a certain amount of stock in the bakery in your town. That is dealing with the individual. I think it is a separate situation. But when you are dealing with a corporation, an artificial party that is subject to the most drastic kind of control, that is another matter.

MR. MCDONOUGH. Mr. Chairman, will the gentleman yield?

MR. SMITH of Virginia. I yield to the gentleman from California.

MR. MCDONOUGH. The gentleman said he thought we ought to treat all alike. Under the gentleman's premise does he agree with the exceptions that are provided in the bill submitted? There are three exceptions.

MR. SMITH of Virginia. I am ready to answer the question. If there is any discrimination in this bill, if there are exceptions that should not be in there, they ought to be taken out.

MR. MCDONOUGH. They are not in the substitute; they are in the committee bill.

MR. SMITH of Virginia. All right, you can take them out of the committee bill. Let us take them out of the committee bill. Let us make the bill apply to everybody, but do not apply that to a bill that we do not know what is in it. I have great confidence in the gentleman from Michigan, but in a matter of this kind I want to be convinced myself from a study of the bill, and we have not had that opportunity.

Senate, April 24, 1956

[Pages 6860-61]

PENDING AMENDMENT PREVENTS BANK ACQUISITION BY OUT-OF-STATE HOLDING COMPANY UNLESS STATE LAW EXPRESSLY PERMITS

MR. DOUGLAS. Our amendment would prohibit bank holding companies from purchasing banks in other States unless such purchases by out-of-State holding companies were specifically permitted by law in such States. At present no State specifically grants such permission. Therefore the immediate practical effect would be to bar the expansion of bank holding companies across State lines. But the amendment would leave the way open for States to make explicit provision for such purchases and acquisitions if they so decided. If they were to do so, then such expansion would be subject to the rules and judgment of the Federal Reserve Board.

Even with my amendment, the Federal Reserve Board would still have final jurisdiction over the acquisition of banks or bank holding companies within a given State, that is, intrastate acquisitions. If and when individual States permitted a bank holding company from another State to acquire assets across State lines, then the Federal Reserve Board would have final jurisdiction in those cases as well.

I wish to repeat that, so far as interstate acquisition of banks is concerned, namely, purchase by bank holding companies of banks in other States, the provision in my amendment is in principle almost identical with the present provision which governs branch banking.

Therefore, it is a logical continuation of the principles of the McFadden Act, which tried to prevent the Federal power from being used to permit national banks to expand across State lines in a way contrary to State policy and, of course, under the McFadden Act, even to expand within a State.

Anyone who favors States rights, it seems to me should support my amendment. I am not urging it on that ground, however. I believe in a somewhat unified banking system. However, so far as the bank holding companies are concerned, I want to check their expansion. This seems to me to be about the best way of doing so.

* * *

MR. BRICKER. Mr. President, I wish briefly to discuss the amendment offered by the Senator from Illinois [Mr. DOUGLAS], not particularly as it affects the rights of the States, although I did serve for many years in my State in a capacity which afforded me opportunity to consider attempts to prevent discrimination by one State against another, the tendency, manifested again 2 years ago to Balkanize State jurisdictions, and matters related to constitutionality, and so forth, and I believe constructive service was rendered in that field. However, I consider a constitutional question to be involved in the amendment submitted by the Senator from Illinois.

Mr. President, the amendment proposed by the Senator from Illinois was considered by the Banking and Currency Committee and was rejected by the committee. In fact, only four votes were recorded in favor of the proposal. The Federal Reserve Board, the Comptroller of the Currency and the Federal Deposit Insurance Corporation are all opposed to this amendment, because, in effect, it con-

stitutes an absolute prohibition against future expansion by bank holding companies. I am sure it is obvious that every bank holding company in the country is opposed to this punitive proposal.

I stated earlier the procedure under S. 2577 for the Federal Reserve to consider every proposed acquisition of additional banks whether within the State or across State lines. Both types of acquisitions are treated the same. Under the bill, a bank holding company must obtain prior approval from the Federal Reserve Board before it can acquire a bank. The Federal Reserve Board in considering an application for an acquisition must take into consideration five factors. These factors are, first, the financial history and condition of the company or companies in the banks concerned; second, their prospects; third, character of their management; fourth, convenience, needs, and welfare of the communities in the area concerned; and, fifth, whether or not the effect of such acquisition would be to expand the size or extent of the bank holding company system involved beyond limits consistent with adequate and sound banking, the public interest, and the preservation of competition in the field of banking.

The last factor I named is the most important and requires the Federal Reserve Board to consider the question of the public interest and the preservation of competition in the field of banking. This provision gives the Federal Reserve Board power to present undue concentrations of banking activities and at the same time permits the strengthening and expansion of banking facilities when needed.

The Douglas amendment prohibits the acquisition of a bank outside the home State of a bank holding company unless the laws of the State to be entered specifically author-

ize such acquisition. I submit, Mr. President, that no State in this country has enacted laws along this line. So the effect of the Douglas amendment is to absolutely prohibit a bank from crossing State lines. This proposal suggests that bank holding companies are evil per se and that any further growth should be prohibited. The amendment is another attempt to force bank holding companies out of business. This is contrary to the theory of the Senate bill which seeks to regulate bank holding companies and not to punish them.

Some statements have been made to the effect that this amendment protects States' rights. I believe that I am as strong a States rights advocate as any Member of this body. However, this amendment forces States to take legislative action to protect themselves and thus is clearly a derogation of States' rights.

Section 7 of S. 2577 preserves the true States' rights in regard to this question. The bill reserves to the States their present authority to regulate bank holding company operations within their borders and does not force the States to take any action. The committee believes that this provision is an adequate preservation of the rights of our States.

I should also like to point out that the Douglas amendment runs counter to the policy of the National Bank Act and our dual system of National and State banks. The National Bank Act recognizes the exclusive jurisdiction of the Federal Government over national banks just as the States have exclusive jurisdiction over State banks. The branch banking law is cited as a precedent for giving powers to States over national banks. The branch-banking law is the only major exception to the general rule that the Federal Government has exclusive jurisdiction over national banks.

However, it must be remembered that prior to the McFadden Act of 1927, national banks did not have statutory authority to establish branches. The purpose of the McFadden Act and the Banking Act of 1933 was to permit national banks to compete with State banks in States which authorized State banks to have branches. Congress merely gave national banks equal powers with State banks in respect to branch offices. These acts enlarged the powers of national banks rather than restricted them. Certainly it cannot be argued successfully that the branch-banking law is a precedent for permitting States to place restrictions on national banks and take away privileges they now enjoy.

In conclusion, Mr. President, I wish to reiterate that the committee rejected this amendment. The Federal Reserve Board, the Comptroller of the Currency, the Federal Deposit Insurance Corporation, and all the bank holding companies are absolutely opposed to it, and I hope the Senate will reject the amendment in the interest of sound banking and the preservation of the competitive system of banking in our country as between the various States and as between the Federal Government and the States.

Senate, April 25, 1956

[Page 6934]

MR. JOHNSON of South Carolina. What was the position taken by the independent bankers of the Nation?

MR. CAPEHART. I do not know that the independent bankers ever testified on this particular subject. I believe I know what the independent bankers want; and I am for it. They want to prevent bank holding companies from expanding, and they want to bring bank holding companies within the same law and under the same rules and regulations under which the independent bankers must live. In all fairness and honesty, I presume they might take the position that if such bank holding companies were permitted to retain their nonbanking asset companies, that would make them a little stronger, because it is a fact that the bank holding company would receive any dividends which might be declared.

On the other hand, this is what would happen. If the bill as written should become law, the holding companies would dispose of their nonbanking assets and another group would acquire them. Either that, or they would siphon them off and give them to their present stockholders. The nonbanking asset companies would not be eliminated. They would not go out of business. They would stay in business. Some bank would handle their banking affairs. Under the bill it will not be the bank holding companies that will own them; and an independent bank somewhere will lend them money.

I cannot make up my mind that we should do for a few what we would not do for all. I cannot quite understand that sort of legislation.

The argument is made that we will freeze the bank holding companies if they do not want to dispose of their nonbanking assets. Of course, that is true. However, under the proposed legislation we are pretty much freezing the banking system of America, in order to get at the evil which has developed and to which the small banks object—and I think rightfully so. In other words, we will be freezing the American banking system. We will practically freeze the banking business and deny any new banks the opportunity of entering the field and competing with the established banks.

I believe the Senate ought to know that before it votes on the bill. It ought to know that it will be freezing the situation.

I suppose I could talk for some time on this amendment, but I do not know that I could cover the ground any better than I already have done. The question involved is very simple. It is whether we wish to treat all the way we are now treating a few. I wish somone would tell me, without becoming emotionally upset, in what way a small banker or independent banker will gain anything by our not permitting bank holding companies to retain their holding if they cannot lend them any money.

House, April 26, 1956

[Page 7165]

THE SPEAKER. Is there objection to the request of the gentleman from Kentucky?

MR. MARTIN. Mr. Speaker, reserving the right to object, do there Senate amendments make any material changes in the legislation as it was passed by the House?

MR. SPENCE. I think not. They make some change, but no material change. I can say that the independent bankers are very much interested in the bill and are anxious to have the bill passed.

APPENDIX Q

Control of Bank Holding Companies: Hearings on S. 880, S. 2350 and H.R. 6227 Before the Subcommittee of the Senate Committee on Banking and Currency, 84th Cong., 1st Sess. (1955) (Excerpt)

CONTROL OF BANK HOLDING COMPANIES

HEARINGS

BEFORE A

SUBCOMMITTEE OF THE
COMMITTEE ON BANKING AND CURRENCY
UNITED STATES SENATE

EIGHTY-FOURTH CONGRESS

FIRST SESSION

ON

S. 880, S. 2350, and H. R. 6227

BILLS TO PROVIDE FOR THE CONTROL AND REGULATION OF BANK HOLDING COMPANIES AND REQUIRE DIVESTMENT OF THEIR NONBANKING INTERESTS

JULY 5, 6, 7, 11, 12, AND 14, 1955

Printed for use of the Committee on Banking and Currency

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WEDNESDAY, JULY 6, 1955

UNITED STATES SENATE,
COMMITTEE ON BANKING AND CURRENCY,
SUBCOMMITTEE ON BANKING,
Washington, D. C.

The subcommittee met, pursuant to recess, in room 301, Senate Office Building, at 10:15 a. m., Senator J. Allen Frear, Jr., acting chairman of the subcommittee, presiding.

Present: Senator Frear.

Also present: Senators Bricker and Holland.

• • •

Statement of John T. Noonan, Counsel, Baystate Corp., Boston, Mass.

• • •

MR. NOONAN. . . .

Passing on, the second objection I will not linger too long on. The second objection is the restriction of bank holding companies to the acquisition of banks in the States where their principal offices are located. Now, Baystate Corp. owns no banks not located in Massachusetts. We have no present plans of acquiring any banks outside of Massachusetts. We are registering our objection to this requirement in the bill or this limitation in the bill largely because we feel that it is extremely unfair to a small State such as Massachusetts.

SENATOR BRICKER. You are addressing yourself now to the Spence bill?

MR. NOONAN. Yes; to H. R. 6227.

Perhaps this protest is engendered merely by that feeling that small States have that they are frequently discriminated against. We border New York State on our

west. New York State is some 6 or 7 times our size. Yet if this bill becomes law a bank holding company may operate in all of New York State in an area some 6 or 7 times our size and with a population many times more than that, while we are limited to the smaller area of Massachusetts.

If you go further west, the situation is accentuated. California is 20 times or more the size of Massachusetts. Texas is 30 times or more.

We just feel, although we have no present intention of going outside of Massachusetts, we shouldn't sit idly by and not raise our voices in protest to a limitation that would operate, as we think, in a discriminatory way against a bank holding company organized and operating in Massachusetts and apply even more strongly to an even smaller State like Rhode Island, and so on.

SENATOR FREAR. Is it not the intention of this H. R. 6227 to limit bank holding companies? I think that is the intention of the act; is it not?

MR. NOONAN. I think it is, Mr. Chairman, and the feeling I would have about that is that that in and of itself may not be an improper or inappropriate purpose, but I believe the approach should be a reasonable one, and I am speaking without giving too much thought but a trade-area approach such as a Federal Reserve district for instance I think could be defended quite logically whereas State lines are historical accident.

Massachusetts is a little State because it is an old State, and why should that historical accident serve today to penalize them?

SENATOR FREAR. Of course, I am sure you are proud of the State of Massachusetts. Delaware is the next smallest State, and there is no person who has any more pride in this State that [*sic*] I.

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APPENDIX R

Hearings on S. 76 and S. 1118 Before the Senate Committee on Banking and Currency, 83rd Cong., 1st Sess. (1953) (Excerpts)

BANK HOLDING LEGISLATION

HEARINGS

BEFORE THE

COMMITTEE ON BANKING AND CURRENCY

UNITED STATES SENATE

EIGHTY-THIRD CONGRESS

FIRST SESSION

ON

S. 76 and S. 1118

BILLS TO PROVIDE FOR THE CONTROL AND REGULATION OF BANK HOLDING COMPANIES, TO REQUIRE DIVESTMENT OF NONBANKING ASSETS, AND FOR OTHER PURPOSES

PART 1

JUNE 10, 11, AND 12, 1953

Printed for the use of the Committee on Banking and Currency

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* * *

THURSDAY, JUNE 11, 1953

UNITED STATES SENATE,
COMMITTEE ON BANKING AND CURRENCY,
Washington, D. C.

The committee met, pursuant to notice, at 10:05 a. m., in room 301, Senate Office Building, Senator Homer E. Capehart, chairman, presiding.

Present: Senators Capehart, Bricker, Bennett, Bush, Payne, Robertson, Sparkman, and Frear.

* * *

STATEMENT OF D. EMMERT BRUMBAUGH, PRESIDENT, INDEPENDENT BANKERS ASSOCIATION OF AMERICA

MR. BRUMBAUGH. My name is D. Emmert Brumbaugh, of Claysburg, Pa., and I am president of the Independent Bankers Association of America. I am also president of the First National Bank, Claysburg, Pa.; a former secretary of banking of the Commonwealth of Pennsylvania, and I am a former Member of Congress from the Keystone State during which time I served as a member of the House Banking and Currency Committee.

In appearing before this committee I am representing 5,212 banks out of the 13,439 commercially insured banks in the Nation, of which 9,456 have less than $5 million in assets. Among these banks approximately 8,500 are State banks and 4,900 are national banks. Our member banks are also members of the American Bankers Association.

The Independent Bankers Association of America is composed of the smaller banks of the Nation that are fight-

ing for their existence because of the monopolistic trend of present-day banking.

The chief offenders in the promotion of this monopolistic trend are the bank holding companies that circumvent the law by establishing "branches" across State lines when the banks themselves do not have such a privilege.

* * *

MR. BRUMBAUGH. The organization of this Independent Bankers Association was brought about due to the continual expansion of holding companies in certain sections of the Nation. With the result that many of the independent banks were being taken over, and had it not been for this organization, by this time there is some possibility that there would have been nationwide banking by holding companies.

SENATOR BUSH. So really, the primary purpose of your organization is to fight this holding-company trend?

MR. BRUMBAUGH. That is correct.

THE CHAIRMAN. You say here the chief offenders in the promotion of this monopolistic trend are the bank holding companies that circumvent the law by establishing branches across the State lines where the bank themselves do not have such privilege?

MR. BRUMBAUGH. That is correct.

THE CHAIRMAN. Can you elaborate a little more on that?

Mr. BRUMBAUGH. I intended to do that a little later on.

If you ask me that question at the close, I think I can explain it a little further to you.

THE CHAIRMAN. I think it is a very important question.

MR. BRUMBAUGH. I have some explanation on that particular subject.

THE CHAIRMAN. What you are saying is that holding companies can do what the banks themselves are not permitted to do?

MR. BRUMBAUGH. That is absolutely correct. They are operating in many States where the State law does not permit branches.

THE CHAIRMAN. You mean if I own a bank in a town X in State X, and I wanted to organize and have some branch banks within that State, that the State laws prohibit it, and yet if I was a holding company in some other State, that I could come in—

MR. BRUMBAUGH. You could buy a bank in that State, and run it as a separate banking institution. There is nothing to prevent the holding companies from going in that State.

THE CHAIRMAN. One or a dozen?

MR. BRUMBAUGH. That is correct.

THE CHAIRMAN. Suppose you proceed?

MR. BRUMBAUGH. Speaking of holding companies before this committee in 1950, Mr. Thomas B. McCabe at that time chairman of the board of the Federal Reserve Bank, said:

> The potential evil of unlimited expansion by bank holding companies is a very serious one. The holding-company device is a readily available instrument for acquiring as many banks as a holding-company management has or can raise the funds to purchase. In some instances the acquisition may occur simply as a result of an exchange of stock of the holding company for that of a bank.
>
> As each new bank is thus added to those already a part of the holding-company system, such bank automatically becomes in effect, though not in name, a

branch of that banking system. Gradually or precipitately, as the case may be, the holding company may obtain and control a greater and greater percentage of the banking offices in a particular area.

It may become the dominant banking influence in such an area. Indeed, it may even be possible in this manner for the holding company to extend its banking power to monopolistic proportions.

In the 1945 report of the Federal Deposit Insurance Corporation monopoly in banking was deplored in the following language:

> Monopoly in the banking business must be carefully guarded against. Only under competitive conditions will the banking system satisfactorily discharge its function of allocating credit to those who can make the most efficient use of it.

Mr. Chairman, the Independent Bankers Association heartily endorses the Capehart bill, S. 1118, because it will prevent further invasion of State rights by bank holding companies, and halt monopolies in the field of banking.

For example, the Transamerica Corp. was responsible for the establishment of 700 branch banks in California with over $8 billion in assets. While it has divested itself of its holdings of stock in the Bank of America it still operates and has controlling interest in banks in five States.

Another example is the First Security Corp. of Ogden, Utah, which now has over 40 offices, some in States where National and State banks are prohibited from establishing branches. This corporation has added several banks to its list within the year.

The First Bank Stock Corp. of Minneapolis, Minn., operates 76 offices in such States as Minnesota, Montana,

North Dakota, and South Dakota where in 3 of these States branch banking is prohibited.

The Northwest Bank Corp. of Minneapolis, Minn., has 91 subsidiary banks in 7 States of which 6 of the States prohibit branch banking.

The Equity Corp. of New York operates 49 offices in 7 States and the District of Columbia despite the fact that many of these States prohibit branch banking.

I have brought these holding companies to your attention because they represent the wide scope of territory they are covering and to convince you that they are without question of doubt circumventing the law by establishing branches across State line in defiance of State and National banking regulations.

* * *

FRIDAY, JUNE 12, 1953

UNITED STATES SENATE,
COMMITTEE OF BANKING AND CURRENCY,
Washington, D.C.

The committee met, pursuant to notice, at 10:05 a. m., in room 301, Senate Office Building, Senator Homer E. Capehart, chairman, presiding.

Present: Senators Capehart, Bennett, Bush, Beall, Payne, and Douglas.

* * *

STATEMENT OF HARRY J. HARDING, PRESIDENT, INDEPENDENT BANKERS ASSOCIATION OF THE 12TH DISTRICT

MR. HARDING. Mr. Chairman, and gentlemen of the committee, first of all, I would like to submit for the record a statement which Mr. Emmert Brumbaugh intended to propose today, expressing the views of the National Association of State Supervisors, which organization has wholeheartedly and strongly endorsed the Capehart bill.

The supervisors have charge of supervising, as well as granting charters to banks in the States, and under their supervision they have about two-thirds of the banks of the country.

THE CHAIRMAN. Have all of the State examiners endorsed this bill?

MR. HARDING. I cannot say that, individually, but the association has, and as far as I understand, all supervisors have concurred in that.

THE CHAIRMAN. All State supervisors?

MR. HARDING. Yes, sir; they have all concurred in that.

THE CHAIRMAN. And the National Association of State Supervisors has likewise endorsed S. 1118?

MR. HARDING. That is correct, sir, wholeheartedly and strongly.

* * *

MR. HARDING. . . .

The hearings on the two bills prepared by the Federal Reserve Board, S. 829 and S. 2318, were productive of many suggestions by both proponents and opponents for improving these bills. Out of these hearings also has come a better understanding of the problem by all concerned, and we independent bankers are deeply grateful to this

committee for the time is [*sic*] has given to the solution of the problem. While it seems some differences sometimes cloud the overall purposes to be accomplished by this legislation, it is our fervent hope that the present hearings will be pushed to a final conclusion.

We have pointed out that the problem stems from the ability of a holding company to evade and circumvent our Nation's banking laws. Legitimatizing an evasion of laws, even in a restricted manner, we feel is no way to cure an evil. The first step, it seems to us, is to agree that the way to end evasion and circumvention of our country's banking laws is to close the loopholes that permit such evasion. That is the purpose of S. 1118. It is a direct and moderate approach. It does not compel the dissolution of bank holding companies nor does it prevent the organization of new companies. It does maintain the autonomy of the separate States as to banking and erects a barrier that will protect a State against invasion by an outside holding company.

Senator Douglas raised a question here a moment ago, whether a State would prevent an outside holding company from coming into a State, and the answer was "No." That was brought out very definitely in the testimony on S. 2318, when Colonel Ely, past president of the Virginia Bankers Association, stressed that point.

It imposes no additional regulations or controls over banks that are not holding companies or subsidiaries of bank holding companies. It delegates discretionary authority to a minimum.

On that point, we are strongly against any discretionary authority in any agency.

It has been pointed out by several supporters of S. 1118 that there are certain fundamentals that seemingly ought to be embodied in any bill attempting to meet the bank holding company problem:

1. Banks cannot operate nonbanking businesses. The management of a bank should not be able to evade this provision of existing laws by the bank holding company device.

2. Banks cannot operate branches across State lines. The holding company device should not be used by a bank to acquire additional banks in other States in circumvention of this restriction.

3. Banks can establish additional offices or branches only in conformity with the laws of their State, and only with the approval of the appropriate supervisory agency. These specific limitations on the expansion of banking offices should not be possible of evasion through the holding company device.

S. 1118 accomplishes all three of these objectives.

APPENDIX S

H. R. Rep. No. 609, 84th Cong. 1st Sess. (1955) (Excerpt)

BANK HOLDING COMPANY ACT OF 1955

MAY 20, 1955—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

---

Mr. SPENCE, from the Committee on Banking and Currency, submitted the following

REPORT

[To accompany H. R. 6227]

The Committee on Banking and Currency, to whom was referred the bill (H. R. 6227) to provide for the control and regulation of bank holding companies, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

THE NEED FOR BANK HOLDING COMPANY LEGISLATION

INTRODUCTION

The need for immediate legislation which would at the same time control the future expansion of bank holding companies and force them to divest themselves of nonbanking business has been established to the complete satisfaction of your committee. It held exhaustive public hearings on H. R. 2674 (since superseded by H. R. 6227) from February 28 through March 9, 1955. Executive sessions extended from April 20 to May 13. The views of the Fed-

eral Reserve System were presented by the Honorable William McChesney Martin, Chairman of its Board of Governors, while those of the Office of the Comptroller of the Currency were presented by the Honorable Ray M. Gidney. Other witnesses representing all shades of opinion in regard to bank holding companies appeared and were afforded every opportunity to set forth their views. All witnesses were subjected to unusually lengthy and searching interrogation by the membership of your committee. The printed hearings, including appropriate exhibits, cover 645 pages.

* * *

The four fundamental reasons for enacting this legislation are set forth below.

BANK HOLDING COMPANIES THWART NATIONAL BANKING POLICY

While our banking structure has evolved down through the years to meet changing economic requirements, this country has held steadfast to the doctrine that competition should prevail in the banking industry. Our national banking policy has aimed at protecting and fostering the growth of independent unit banks.

Repeatedly Congress has been urged to break down the restrictions in the national banking law regarding branches of national banks. Congress has been urged to permit branches, regardless of State bank laws, on a trade area basis, on an interstate or Federal Reserve district basis, and in fact on a nationwide basis. Each time, however, Congress has declared its approval of the American system of local independent and competitive banks, and has left the matter of branches to the States to determine, each State for itself. In spite of these rebuffs, those who have

sought to concentrate banking control into fewer and fewer hands have been able, in certain areas of the country, to accomplish their purpose to a substantial extent through the holding company device, acquiring control of a group of banks which, can thereafter be operated, in effect, as branches.

The opponents of H. R. 6227, it is true, have contended that to base holding company legislation on branch banking law is wrong, because there is a difference between branches and affiliated, or subsidiary, banks. Great stress has been placed on their difference in form, which everyone of course recognizes. Your committee feels, however, in a large measure they are differences without a distinction. Other than in form, what is the practical difference between a branch and a bank the stock of which is owned by a holding company that can select the bank's directors and change them at its pleasure, even holding repurchase rights to the directors' qualifying shares; that can hire and fire the bank's personnel and otherwise supervise its operations; that can make its investments, handle its insurance, buy its supplies, originate and place its advertising; can pass on its loans to local firms and individuals, usually receiving a fee for services performed?

Bankers certainly should know whether bank holding company subsidiaries can in effect be operated as branches. A bankers' association asked the bankers of the country this question: "Do you consider holding company banking, in effect, branch banking"? More than 97 percent of the replies were "Yes."

Your committee believes it is obvious that the declared will of Congress in favor of independent competitive banking is being thwarted by indirect branch banking, through the mechanism of the holding company.

APPENDIX T

Report of the President (1981) (Excerpt)

Chapter 7

The McFadden Act and the Dual Banking System

* * *

III. *Branching and Bank Acquisitions: Some Reform Alternatives and Dual Banking*

* * *

Geographically Limited Expansion

The second policy reform option, Congressional permission for national banks and state banks to branch statewide *and* across state lines within standard metropolitan statistical areas or within natural market areas in states contiguous to their main office, would impact the dual banking system in one important respect. The competitive equality between national and state banks would not be disturbed. However, the role of the state regulator would change in the sense that he would have to collaborate or cooperate with his counterparts in adjacent states to decide state bank branch applications and provide for examination of the branches in the interstate network. Presumably, a state bank seeking to establish a branch office in an adjacent state would need the approval of the home state regulator and the regulatory authority in the adjacent jurisdiction. The FRB and the FDIC would

continue to have veto power over state bank branch applications that they currently possess in the single state framework.

Congress need not work out the details of how the state regulators will coordinate their supervisory activities in the branching area. Indeed, the state banking system might ultimately be strengthened to the extent that state regulators are influenced or impelled by Congressional branching reform to resolve and coordinate their supervisory policies and strategies.[1] It is also relevant to note that two Federal agencies, the FRB and FDIC, help to cement together the 50 disparate state banking jurisdictions in the process of implementing Federal banking laws in a variety of areas. They could play a similar role on branching.

* * *

1. One state supervisor, Mr. Richard Francis of Michigan, has recently testified that financial institutions must be given more liberal branching powers to avoid going "the way of handloom weavers in nineteenth century England." Mr. Francis suggested that the Federal government should encourage interstate compacts so that people in metropolitan areas could be served in their workplace and residence. See, Hearings on Federal Branching Policy Before Subcommittee on Financial Institutions of Senate Committee on Banking, Housing and Urban Affairs, 94th Congress, 2d Session 105, 109 (1977).

Chapter 8

Foreign Banks in the U.S. and the McFadden Act

This chapter explores foreign bank operations in this country and provides a foundation for drawing conclusions on how foreign bank activity affects McFadden Act reform. It also summarizes key provisions of national banking law, state branching statutues [*sic*], and statistics on foreign bank operations in the U.S. By drawing attention to the problem of interstate branching, foreign banks have highlighted the principal issue which regulators must address as financial corporations compete to expand in more sophisticated markets.

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VIII. *Foreign Banks and the McFadden Policy Options*

Partial Liberalization of Current Geographic Restrictions

Expansion Limits by Market Concentration. This option allows interstate expansion into those markets where the market share of total banking business has become concentrated among two or three leading banks. "Concentration" usually measures the distribution of total deposits and/or total banking assets between leading financial institutions in the relevant market area. However, such percentages may be misleading because concentration does not necessarily indicate too few bank offices, inadequate financial services, or high costs to the consumer. Concentration does normally indicate greater chances of cartelization or trends toward monopoly, which raises the

probability that the provision of credit and financial services will become suboptimal.

The concentration measures should work as a trigger mechanism; interstate branching (entry for out-of-state competitors) would be permitted when concentration rose above defined maximum percentages in relevant market areas.

a. *Difficulties and Disadvantages.*

The main problem is defining "market concentration" in a way which allows bank expansion to areas able to support new entrants and where new offices are needed. The simple (traditional) measure of concentration does not measure whether a market is underbanked or overbanked.[1] Therefore expansion by market concentration, as traditionally defined, may work to increase the number of offices (new entrants via *de novo* branching) in areas where office numbers may be close to optimal.[2] Refining the definition of concentration to take account of the number of bank offices poses statistical problems—measuring offices per capita does not guarantee profitability in low income urban areas, and measuring per capita personal income per office is probably inequitable.[3] Restricting interstate ex-

1. Underbanked does not mean underserved or inconvenienced; although liberal branching usually leads to greater concentration, it also usually creates more bank offices per capita. [See Longbrake, page 159, (*JBR*, 1973); Jacobs (1965) and Anderson (1964)].

2. The counter-argument is, of course, that the market can always accomodate a more efficient competitor, *i.e.*, that the new offices would be more efficient than the existing ones.

3. For suggested methods of measuring the optimal number of offices, see Joseph J. Horton, "Florida Banking", in *Business and Economic Dimensions*, December 1969 and "A Comparative Evaluation of the Adequacy of Florida Banking," Working Paper 69-11, Federal Deposit Insurance Corporation, 1972.

pansion to "concentrated" areas prevents new entrants from penetrating markets where their competition would bring more varied services, greater efficiency, or improve consumer convenience. For example, in unconcentrated unit banking states, no new out-of-state entrants would be allowed in to bring economies of scale,[4] or to increase the number of banking offices for consumer benefit.

A principal problem with the "expansion to concentrated markets only" option is that those markets might seldom be attractive to foreign and U.S. banks. Concentration often indicates economically stagnant or slow-growth markets. The difficulty of gaining new market share [*sic*], absent divestiture of existing branches to the new entrant makes concentrated markets even less attractive.

The market concentration option maximizes neither ease of entry nor ease of exit in the defined concentrated markets.

Finally, if expansion to concentrated areas is carried out by BHC acquisition, concentration does not necessarily decline. The acquired bank would hold the same market percentage as before of assets and liabilities. (Concentration *would* be reduced if the BHC built up a small bank's market share with new management, technology and expansion capital.)

b. *Advantages.*

First, it is an easy option to justify, based on the obvious relation between concentration and the likelihood of monopoly or cartelization. Second, it would direct expansion capital towards states which already have liberalized

4. Specifically, scale economies for financial services easily centralized at the head office (business loans, real estate loans, sale of securities); *cf.* Longbrake, *JBR*, 1973, 305-306.

branching. Third, "entrenched" banks (those holding a large percentage of the market) might be more able to compete with the new competitors, large foreign or U.S. banks, than other banks under other options. Fourth, it affects fewer market areas and generates less political opposition than complete repeal. Furthermore, by definition, interstate expansion based on market concentration works to reduce costs of credit by introducing new competitors who reduce market power. There is little evidence that new branches would be insensitive to local credit needs.[1]

c. *Conclusions.*

In all cases under this option, foreign banks increase the likelihood that new entrants will expand into markets opened by the concentration trigger mechanism. Insofar as their marginal utility from retail deposits may exceed that of many U.S. banks, foreign banks may more easily justify the costs of interstate expansion to distant concentrated areas. There are no data to foresee whether foreign banks would choose *de novo* branching or BHC acquisitions to enter concentrated markets. If via the BHC, it is uncertain whether they would have management expertise and confidence to purchase "turnaround" cases, *i.e.*, banks which face sale or continued loss of market share. Clearly the regulatory agencies approving BHC expansion into a concentrated area would look to the purchaser's ability and intent to reduce concentration.

1. See Ernest Kohn, "Branch Banking, Bank Mergers and the Public Interest," New York State Banking Department, January 1964. Kohn studied U.S. bank branches, but it is assumed, as specified at the outset, that foreign branches would pursue the same business as domestic bank branches.

Expansion by Bank Holding Company Only. Under this option interstate expansion takes place via the organizational form of a BHC rather than via *de novo* branching; the McFadden Act remains law and prevents building branch networks, both interstate and intrastate but the Douglas Amendment, specifically Section 3(d) of the BHC Act of 1956, is repealed or modified to permit BHCs to own banks outside the home state. BHCs would be able to purchase banks in other states provided the acquisition violated no state laws; hence this option has both the advantage and disadvantage of being easily avoided by concerned protectionist state legislators.[1] The "BHC Only" option could be implemented in several ways, some of which are suggested below.

a. *Permit Interstate Acquisition Nationwide.*

This change repeals Section 3(d) (Douglas Amendment) completely, permitting BHCs to acquire banks beyond their home state. Antitrust laws would still apply, as well as possible state standards which restrict BHC expansion, provided those standards did not discriminate

1. The states' rights issue here centers around Section 7 of the BHC Act of 1956, which retains for states "such powers and jurisdiction which [they] now [have] or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof." Congressional intent was to preserve state jurisdiction over the form of its banking structure, which includes the right to legislate on BHC operations. Court decisions seem to support nondiscriminatory state situations. For out-of-state acquisitions, if Section 3d were repealed court decisions seem to support that states could prevent out-of-state BHC acquisitions, unless the state statute is discriminatory. In essence, the state can altogether prohibit BHCs, or it can restrict them, but it cannot discriminate against out-of-state BHCs. (For further discussion see *A Study of Interstate BHCs*, Golembe Associates, Washington, D.C., May 1979).

against out-of-state BHCs. (State silence on BHC entry would not suffice.) Foreign banks would act as large U.S. BHCs.

b. *Permit Interstate Acquisition Over Natural Geographic Areas.*

Natural geographic areas means, in practice, natural markets usually defined as the larger SMSAs which straddle state boundaries (see Appendix B). Unit banks in smaller SMSAs or rural areas would lie outside the natural market area and be protected from BHC acquisition. Foreign BHCs would probably prefer buying banks in larger SMSAs (*e.g.*, population exceeding 2 million), so this option does not prevent foreign banks from competing for takeovers.

c. *Permit Interstate Acquisitions in Selected Markets.*

This method permits entry into those markets where the public benefit and convenience would be served by allowing out-of-state banks to compete. For example, as discussed under the market concentration option, BHCs could be permitted into new state markets if it were seen they would revitalize a marginal competitor to reduce market concentration. A different variation would allow BHCs into any market if the acquisition target were a troubled or failing bank; this variation introduces new management and support capital at a critical time, serves to bolster public confidence and prevents FDIC and other regulators from initiating a forced sale.

d. *Advantages of the "BHC Only" Option.*

First, it liberalizes interstate bank expansion in a way which states can easily block via statutes restricting BHC acquisitions, provided those statutes do not discriminate between in-state and out-of-state BHCs. States retain power to determine their own preferred banking structure.

Second, BHC acquisitions can bring new management technology and capital to improve operations at the acquired bank. The option works to increase operating efficiency of the national banking system without the additional cost of *de novo* branching.

Third, permitting foreign BHCs under this option helps reduce the level of national concentration which would result if only U.S. BHCs were allowed to expand interstate.

Fourth, it gives management and shareholders of marginal banks a greater option to sell at a premium, rather than sell or merge under adverse conditions (*i.e.*, facing strong competitive pressure from out-of-state branches which entered the local market after repeal of McFadden.)

e. *Disadvantages of the "BHC Only" Option.*

First, it does not address the issue of branching and the McFadden Act. Unit banked states, or areas allowing only limited branching, would remain unchanged. The option brings none of the advantages associated with branching.

Second, it constrains interstate expansion to a single organizational form—BHC—which may not be appropriate, most cost efficient or otherwise fully desirable for each market.

Third, it encourages bank acquisitions. This option raises the likelihood more U.S. banks will become subsidiaries of foreign banks.

Fourth, the option does not guarantee all states will receive new out-of-state competition. States can much more easily prevent BHCs freed from the Douglas Amendment than national banks freed from the McFadden Act. State legislatures may pass (nondiscriminatory) laws restricing BHC acquisitions, and thus shelter their local banks from both foreign and U.S. BHCs. As a result, the bidding for banks in other states could become even more competitive. "BHC Only" does not necessarily lead to a nationwide banking system.

Fifth, BHC expansion into concentrated markets does not *guarantee* those markets will become less concentrated, unless the BHC has entered with the intention of stimulating operations and building a significantly larger market share. It is uncertain how effective foreign banks' management would be in revitalizing a marginal competitor in a local market.

Sixth, it may be argued this option works to increase concentration at national levels, bringing more U.S. banking resources under centralized BHC management.

f. *Conclusion: "BHC Only" Option.*

Any BHC acquisition requires consent of the Federal Reserve Board. Under the BHC Act, the target bank's primary supervisor (OCC or the state bank supervisor), as well as the Department of Justice, must first be notified by the FRB and given the opportunity to comment on the proposed acquisition. Therefore, regardless of how the Douglas Amendment is modified, regulatory bodies would still have the opportunity to oppose takeovers which worked against the public interest.

However, the difficulty with repealing just the Douglas Amendment is that it restricts intrastate and interstate bank expansion to a specific organizational form which is not necessarily most appropirate or efficient. Most important perhaps, the "BHC Only" option does not address the McFadden branching issue.

Expansion Within Limited Geographic Areas. This option comtemplates replacing some state boundaries with other definitions of boundaries—population, city lines, county lines, etc.—usually defined within an SMSA which straddles state lines.[1] It is assumed that all banking services could be offered within the liberalized SMSA by banks from contiguous states. Foreign banks would not add significantly to the total number of potential competitors seeking to enter the liberalized market area, unless competitors are redefined to allow *all* out-of-state banks, regardless of whether they come from contiguous states. The option is faulty insofar as it prevents branch expansion to structurally similar SMSAs which do *not* straddle state boundaries; hence aggressive foreign and U.S. banks could still argue that McFadden restrictions prevented expansion to growing SMSAs where consumers needed new banking offices.

a. *Advantages of the "National Market Area" Option.*

The difficulty of defining a "natural market area" is nevertheless an advantage in this option, because flexible (vague) definitions would permit bank regulators to proceed with caution, or accelerate liberalization as warranted.

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1. The kind of SMSA of special relevance would be a central city and its suburbs crossing state lines, in which economic and other inter-relationships exist to create a natural market area for all banking services.

Other advantages of the natural market area approach include its direct relation to retail market, and its gradualistic approach and experimental nature. Larger SMSAs are, almost without exception, the retail markets banks seek if they could expand interstate. Wholesale lending is already a nationwide market and expansion by natural market area (*e.g.*, SMSAs which straddle state lines) does not immediately put pressure on unit banks (in smaller towns or rural areas) which lie outside of the defined natural market area.

Because regulators must define natural market areas, the option lends itself to gradual liberalization, watching how out-of-state banks expand to the first experimentally-defined natural market areas,[1] and allowing regulators to prevent misuses of the expansion privilege by foreign or U.S. banks.

b. *Disadvantages of the "Natural Market Area" Option.*

Difficulties of the natural market area option are: (1) How should a natural market area be defined? According to population, per capita income, per number of retail businesses, per fixed relationships between all these variables, etc.? The regulator is open to criticism regardless of how the market area is defined. (2) The option can be quickly outmoded by technological change[2] or rapid economic growth; the definition of natural market area would have to remain flexible and open to frequent revision. The con-

1. *E.g.*, the proposed experiment to allow savings and loan associations to branch into Maryland and Virginia where those states join the Washington, D.C. SMSA.

2. For example, what is the natural market area for electronic funds transfer services? What is the natural market area for drawing cash from EFT terminals?

cept would evolve with banking and services themselves. (3) Natural market area for whom? For foreign banks, the only interstate "natural market" SMSA is the New York, N.Y.-New Jersey SMSA.

c. *Conclusions.*

In the absence of complete liberalization of geographic restrictions on branching and BHC acquisitions, the "natural market area" option addresses the principal issue of competition for consumer (retail) business with a potentially flexible tool, the definition of a natural market. If natural market areas are opened to *all* national banks, regardless of proximity to the market, then *the* McFadden principal issue is addressed by achieving national competition for consumer (retail) business. Foreign banks will increase competition among entrants to liberalize market areas, and raise the quality of service to gain consumer business.

Other variations include opening SMSAs regardless of whether they straddle state lines, and opening expansion to contiguous states. Interstate expansion to SMSAs (as defined, *i.e.*, of a minimum size such as above 2 million population) allows foreign (and U.S.) banks to go after the most important markets. The option protects small banks and unit banks outside SMSAs (as defined); foreign banks are treated equally with U.S. banks, but U.S. banks are treated unequally *inter pares* (not all face out-of-state competition). The suboption does not lead to full intrastate branching and is slightly less provocative on the issue of states' rights. Not all states are affected; some may have populations too dispersed to qualify for a "free branching SMSA".[1] The SMSA suboption focuses on the retail bank-

1. Such as the unit banking states of Montana, Nebraska, North Dakota, Wyoming.

ing sector and cuts to the heart of "deMcFaddenization" without raising broader questions to complete geographic liberalization.

Interstate expansion to contiguous states restricts most foreign bank expansion to:

Oregon		Wisconsin	Vermont
Nevada		Indiana	Massachusetts
California	Iowa	*Illinois*	*New York*
Arizona		Kentucky	Connecticut
		Missouri	Pennsylvania
			New Jersey

Foreign banks should only be allowed to expand in states contiguous to their home state, because U.S. banks have only one "home" state (California and New York would be the home states for most foreign banks.) Not all U.S. banking markets would receive foreign bank competition; the suboption does not maximize foreign banks' potential contribution to improve competition, raise efficiency, lower service costs, lower loan spreads, and increase user convenience. Contiguous states do not necessarily form natural market areas; state boundaries still serve as banking boundaries, although banking boundaries become more regional.

Of (1) natural market areas, (2) SMSAs nationwide (as defined), and (3) contiguous states, the second is most liberal because it offers foreign (and U.S.) banks more opportunities to expand interstate. Opening progressively smaller SMSAs gives regulators flexibility to test progressively liberal interstate expansion, and, of the three suboptions, maximizes foreign banks' potential contribution to competition and efficiency.

Appendix B to Chapter 8

Standard Metropolitan Statistical Areas That are in Two or More States: Population and Bank Deposits

Area	*Population (thousands)*[1]	*Commercial Bank Deposits (millions of dollars)*[2]
Allentown-Bethleham-Easton, Pa.-N.J.	628	3,012
Augusta, Ga.-S.C.	291	690
Binghamton, N.Y.-Pa.	311	867
Chattanooga, Tenn.-Ga.	406	1,248
Cincinnati, Ohio-Ky.-Ind.	1,371	4,039
Clarksville-Hopkinsville, Tenn.-Ky.	149	416
Columbus, Ga.-Ala.	231	528
Davenport-Rock Island-Moline, Iowa-Ill.	376	1,694
Duluth-Superior, Minn.-Wisc.	268	980
Evansville, Ind.-Ky.	286	1,310
Fall River, Mass.-R.I.	186	259
Fargo-Moorhead, N.D.-Minn.	133	677
Fort Smith, Ark.-Okla.	191	607
Grand Forks, N.D.-Minn.	106	226
Huntington, Ashland, WVa.-Ky.-Ohio	294	999
Johnson City-Kingsport-Bristol, Tenn.-Va.	413	1,102
Kansas City, Mo.-Kan.	1,292	6,184
Lawrence-Haverhill, Mass.-N.H.	274	667
Louisville, Ky.-Ind.	884	3,862
Lowell, Mass.-N.H.	233	310
Memphis, Tenn.-Ark.-Miss.	904	3,287
Minneapolis-St. Paul, Minn.-Wisc.	2,046	9,623
New London-Norwich, Conn.-R.I.	257	469
New York, N.Y.-N.J.	9,279	133,561
Norfolk-Virginia Beach-Portsmouth, Va.-N.C.	825	1,867

1. 1979 estimates, from Commercial Atlas and Marketing Guide (Chicago: Rand McNally & Co.) 1979.

2. June 30, 1978, from FDIC, Summary of Deposits in All Commercial and Mutual Savings Banks.

Area	*Population (thousands)*[1]	*Commercial Bank Deposits (millions of dollars)*[2]
Omaha, Neb.-Iowa	592	2,210
Parkersburg-Marietta, WVa.-Ohio	155	602
Philadelphia, Pa.-N.J.	4,800	19,305
Portland, Ore.-Wash.	1,155	4,409
Providence-Warwick-Pawtucket, R.I.-Mass.	898	3,841
St. Louis, Mo.-Ill.	2,381	10,260
Springfield-Chicopee-Holyoke, Mass.-Conn.	546	990
Steubenville-Weirton, Ohio-WVa.	162	557
Texarkana, Tex.-Texarkana, Ark.	120	404
Toledo, Ohio-Mich.	784	2,695
Washington, D.C.-Md.-Va.	3,061	10,867
Wheeling, WVa.-Ohio	181	717
Wilmington, Del.-N.J.-Md.	522	2,028

1. 1979 estimates from Commercial Atlas and Marketing Guide (Chicago: Rand McNally & Co.) 1979.

2. June 30, 1978, from FDIC, Summary of Deposits in All Commercial and Mutual Savings Banks.

APPENDIX U

Massachusetts House Committee on Banks and Banking Research Staff Summary (November 9, 1982) (Excerpt)

HOUSE 6724

NEW DRAFT OF SENATE 2011

An Act Relative to Branch Offices and Acquisitions of Financial Institutions

Senate 2011 seeks to establish in the General Laws the necessary authority for a regional, New England, banking system. Although this main thrust is clearly contained in the Senate-passed legislation, that bill failed to cover every option for implementing this authority. Additionally, language has been added to ensure that only New England based financial institutions can avail themselves of this authority.

In general, the new draft amends the following statutes:

- the foreign banking statutes
- the bank holding company law
- the electronic banking act
- the branch office law
- the statutes governing mergers and purchases
- certain mortgage lending statutes

The new draft is keyed to the recodified banking laws as set out in Chapter 155 of the Acts of 1982. It amends that Chapter 155 to clarify that its recodified provisions become effective on July 1, 1983. This clarification is made due to

recent passage of a banking reform act by Congress. The effective date section sets out the following time sequence:

- limitation of entry by foreign banks effective on passage
- holding company and electronic banking authority effective July 1, 1983
- branching, merger and purchase provisions become effective on July 1, 1983

Since the new draft amends the recodified laws certain technical corrections, if any, are made at this time.

A section-by-section analysis of the new draft follows:

(*Sections 1 and 2 amend the foreign banking laws*)

SECTION 1. The amendments to these statutes are necessary to restrict the present statute allowing any out-of-state banking corporation to do business in the Commonwealth if it obtains the necessary certificate and meets other statutory requirements.

Under the new draft this out-of-state entry is limited to New England financial institutions or banks from other countries. Additionally, provisions are added requiring that other regional state to grant similar authority to Massachusetts banks. Generally an out-of-state institution must operate in accordance with the laws governing our state-chartered banks.

The new draft retains the authority for any corporation to enter to perform only fiduciary duties.

This section would become effective upon passage and foreign corporations now operating in the state are grand-

fathered in. Certain antiquated sections of law are eliminated.

SECTION 2. This section amends the same sections as section 1 above as they appear in the new recodified banking law which becomes effective on July 1, 1983. Technically, it is necessary to make these changes in conjunction with section 1.

Section 2 will become effective on July 1, 1983.

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APPENDIX V

Testimony by Massachusetts Senator John A. Brennan Jr. Before Connecticut Legislature (March 3, 1983) (Excerpt)

SEN. SULLIVAN:

* * *

[S]o at this time now, I'd like to open the public portion of the meeting and we are honored to have with us today a member of the Legislature of the Commonwealth of Massachusetts, a man by the name of Senator John Brennan, who is the chairman of the Senate side of the banks committee and the legislature and who probably had more to do with bringing forth the regional bank bill in the State of Massachusetts than probably anybody in the entire legislature.

He has consented at my request and at the request of some of the members of the legislature here, to come down today and give us some insight as to how they came forth with the bill that they did come out with, which by the way, is the regional type bill. So at this time I would like to call on Senator Brennan to give us some of his views on it. And the next speaker will be Preston King.

SEN. BRENNAN: Thank you very much Mr. Chairman and members of the committee. It is a great privilege for me today, a country boy from up in Massachusetts to be in the great State of Connecticut especially to address the chamber. I welcome the opportunity to share with you some of our ideas and concepts that grew up and developed and evolved over the so called regional or New England Regional Experimental Banking Network, if you will, and basically to offer my comments in a conceptual way, Mr. Chairman and members of the committee, as opposed to

specifically commenting on the legislation that is before you, I wouldn't be that presumptious. But I do wholeheartedly recommend to you Mr. Chairman and members of the committee the adoption of a regional approach to interstate banking. It is similar to the approach that we have taken in Massachusetts. A brief overview of your legislation, and the specific legislation that you are considering today, it bears remarkable similarity to the Massachusetts bill, but it's a little bit narrower than our concept. But I think it would be a very very good companion to the Massachusetts concept that is also in place in the State of Maine. I think it has some very definite benefits for the banking institutions, both in your state and in the region, and also for the banking public here in the New England region. My reasons in support of that, Mr. Chairman and members of the committee, are as follows—I come at it from accepting a basic premise, it was first stated here today by the your banking commissioner, and that is that within a reasonably short period of time, that interstate banking on a national basis will be a reality, and if you accept that as a basic premise, my arguments in support of a regional concept flow quite nicely. Of course if you don't accept the basic premise that regional banking will be here on a national basis in a relatively short time, then the arguments will fall down. But I believe, as do most of the observers of the banking scene on a national basis, that interstate banking will be here on a national basis within a very short period of time.

Indeed, as far as non-banking financial institutions are concerned, we have interstate banking going on in every neighborhood and every city and town in your state and my state and every state in the [*sic*] rate today with the

money market accounts being offered by the various mutual funds and also that Merril Lynche's [*sic*] of the world and Sears Roebuck's just to name a couple. I think it is advisable for a region such as ours, a region that has a tradition of cooperativeness, a region that has a tradition of regional pride, Mr. Chairman, to get up and get going in terms of providing the banking institutions within this region whoever had a tradition and a concern for the stability and the vitality and the economic health of this region. Provide those entities with a testing ground for a freak period of time, so that they will have an opportunity to be in a healthier situation, they'll have an opportunity to accustom themselves, if you will, to the rigas [*sic*] of interstate banking, before they have to go head on head with the stiffer competition on a national basis. By the same token, as they, the institutions themselves are gearing up becoming accustomed to what is a radical departure from the traditional way of doing banking, that they'll have a sense, I believe, Mr. Chairman, it's my opinion, they'll have a sense and a commitment based on their tradition of service to the region of further providing banking services and servicing the credit needs of the consumers and small businesses within the New England region. There have been some concerns voiced in certain quarters about the constitutional aspects of such a proposal. I don't pretend to be a constitutional expert, but I have and along with my staff examined extensively the constitutional aspects of this proposal. I believe that a regional approach the banking rests on very very firm constitutional grounds. That based primarily on among other things, a review of the Douglas Amendment, which my interpretation of the Douglas Amendment McFadden Bank Act, specifically delegates, Mr. Chairman

and members of the committee, the right of states to engage in interstate banking to us, the state, the state legislators have that authority. And I think we exercise that authority prudently when we make that decision to go forward with interstate banking. And it's a prudent decision to approach it on a regionalized method of doing things for the following reasons that banking has traditionally been very, very protective in a sense for concern for the safety and soundness reasons primarily in that we have these artificial political barriers as I call them, the geographic barriers that have grown up, but banking has been accustomed to doing business in that manner.

If we are going to embark, as I believe we should, on a radical new way of doing banking nationally, that we should approach that in a measured reason manner in a regional approach is the way to go Mr. Chairman. Those are basically my thoughts on the issue. I'd be very, very happy to share with you any further research that we have done on the issue in Massachusetts and answer any questions that you Mr. Chairman or members of the committee may have.

APPENDIX W

Connecticut House Debate (May 26, 1983) (Excerpt)

REPRESENTATIVE ONORATO:

* * *

And if you want to talk about riding roughshod, if you want to talk about protecting the integrity of our own Connecticut home banks, what this bill does is gives Connecticut the lead time that it needs to go into the regional areas where they have something in common with the other members.

Give them a chance to grow and then they'll be in a position to compete.

* * *

What we're trying to do here is protect the integrity of our own system, of our own banking industry. And yes, in the long run the consumers will benefit from it when you have healthy competition, and there will be healthy competition.

Mr. Speaker, I have something that I read yesterday as a matter of fact that the White House may push for interstate banking next year. It stated May 24, which is two days ago. It shows you how close we are to interstate banking. If the Federal government proposes interstate banking on a national level, where does that leave the State of Connecticut? At whose mercy? How does that make the State of Connecticut stronger? How does it make its

institution stronger so that it can be able to compete, or do we want banks from other parts of this country to come in and call Connecticut their home and meanwhile we have no banks we can call ours.

That's what this bill is trying to accomplish. And it's setting up the lead time that we believe is necessary to accomplish this purpose. Yes, interstate banking will come, interstate banking will come on a national basis, and that's probably good.

But give our state and our institutions that are taking care of the people, that are taking care of the problems in in this state, give them a chance to compete and compete fairly. Don't let them go under the first bank that comes in. That's all this bill is trying to do. That's why Rhode Island passed theirs last week and the Governor signed it.

That's why Massachusetts has a law on its books, scheduled to go in effect July 1. That's why Maine has one, although given the location of Maine, with the ocean on one side and Canada on the other side, it was a smart move for them to go national.

But that's why these things are done. To protect what's theirs that's within their own state.

APPENDIX X

Connecticut Senate Debate (May 18, 1983) (Excerpt)

SENATOR SULLIVAN:

* * *

[I] want to commend the committee for the long, hard hours they put into listening to various testimony in regards to this and, Mr. President, the main reason for this New England position is that if we were to open the doors up a big bank, and I mentioned these various banks, a large bank with a hundred billion dollar asset [*sic*], could come into Connecticut and pick up two or three or four or five banks or four banks or three banks and then bring their entire marketing operation into Connecticut and a bank that size could overwhelm almost any bank we have here right now. So, Mr. President, we thought that to give our banks in Connecticut time to gird for the eventual coming of wide-open interstate banking, which I have no doubt is going to come, when, I'm not sure about that, but I know in the future it will come, in order to give our banks in Connecticut time to merge and consolidate and purchase some of New England banks around and get as large as they possibly can so we can thwart any intervention as best we can from the large institutions and still provide the service, the loan power of the banks that we have in Connecticut today to our Connecticut consumers. As we know, many of the large New York banks have great, great investments in foreign countries and so there's a fear that they would come into Connecticut, get our deposits and invest them in foreign coun-

tries, so we've tried to the best of our ability to prevent this from happening and the result is the New England Bank, and, Mr. President, I would move adoption of this amendment and I hope it would be unanimous and I would ask for a roll call vote, Mr. President.

* * *

Mr. President, just to answer a few of the questions. I think Senator Santaniello pointed out that the Massachusetts law was much more favorable to Massachusetts than the Connecticut law would be and that they were getging the advantage. Well I have a letter from the Deputy Commissioner of Banking in Massachusetts, a Mr. Edward Flynn, Jr., who indicates to me that our law fairly well tracks their law so it's pretty compatable, the law is. As regards to Mr. Santaniello mentioning the big, large banking centers in Boston, when you take seventeen million dollars and you compare it to just one bank in New York of a hundred and twenty-three or a hundred and twenty-four million, that bank is (inaudible) too. What we're trying to do here is to get our New England financial institutions in a position where they can withstand the assault of the big money markets and in answer to Mr. Santaniello's question about some of our Fortune Five Hundred corporations going to New York now, that's one of the purposes of this bill here, so that we can get the New England banks merged together and bought together so that they can offer larger loans to these Fortune Five Hundred companies and compete with the big money centers in New York and get stronger and stronger for the eventual time when interstate banking comes, if that ever comes . . . .

APPENDIX Y

Resolution of the Caucus of New England State Legislatures

CAUCUS OF NEW ENGLAND STATE LEGISLATURES

Hon. John L. Martin, Chairman
Speaker of the Maine House

Carolyn Morwick, Director

Room 1301
250 Stuart Street
Boston, Mass. 02116
(617) 451-0263

Whereas the American financial system is undergoing a transformation due to present economic conditions, modern technology and the establishment of new financial entities; and

Whereas recent federal actions have accelerated this transformation of our financial system particularly as it relates to banking; and

Whereas these developments presage the institution of nationwide interstate banking through federal action; and

Whereas the banking public of New England has a direct and abiding interest in a strong, local, financial network to provide services; capitol and community economic security;

Therefore, be it resolved by the Caucus of New England State Legislatures that a Committee be established comprised of two legislators from each of the New England states, one appointed by the Speaker of the House and one appointed by the Senate President of each legislature for the purpose of pursuing the establishment of a regional banking system in order to strengthen the economic health and vitality of the region.

APPENDIX Z

Program Agenda for "A Conference on New England Regional Banking" (February 4-5, 1983)

The Caucus of New England State Legislatu es

in conjunction with

The New England Governors' Conference

The Council of State Governments
Eastern Regional Conference

and

The New England Congressional Caucus

presents

"A CONFERENCE ON
NEW ENGLAND REGIONAL BANKING"

An educational forum to expore the concept of a New England interstate banking system.

February 4-5, 1983

Boston Marriott Hotel/Long Wharf
Boston, Massachusetts

February 4, 1983

PROGRAM

Morning

9:30-11:30 REGISTRATION

Boston Marriott Hotel/Long Wharf

Those participating in the conference are requested to sign in.

11:45-1:00 LUNCHEON

Boston Marriott Hotel/Long Wharf

Welcome: Speaker John Martin, Maine
Chairman, Caucus of New England State Legislatures

Remarks: The Honorable
Michael S. Dukakis
Governor, Commonwealth of Massachusetts

Afternoon

1:30-4:00 PANEL DISCUSSION

Moderator: Speaker John Martin, Maine

Issues: A, B, C.

A: *"New England Regional Banking"*
Legislative Panel

Moderator, Senator John Brennan, Massachusetts

February 4, 1983

PROGRAM

B: *"Implications at the Federal Level"*

Speaker, Charlotte Staelin,
Executive Director
New England
Congressional Institute
Washington, DC

Speaker, Richard Syron,
Senior Vice President
Federal Reserve Bank,
Boston, Massachusetts

C: *"Implications at the State Level"*

Moderator, Commissioner
Gerald Mulligan,
Massachusetts
H. Donald DeMatteis,
Bank Superintendent,
Maine.
Commissioner
Brian Woolf,
Connecticut

(4:00-5:30 CHECK IN TIME FOR THOSE REGISTERED AT THE HOTEL)

February 4, 1983

PROGRAM

Evening

5:30-8:30	RECEPTION AND DINNER
5:30-6:30	Cocktails (Cash Bar)
6:30-8:30	Dinner
	Remarks: Senate President, William Bulger, Massachusetts

THERE WILL BE A SHUTTLE BUS AT THE MARRIOTT AT 5:15 TO TRANSPORT PEOPLE TO THE HARVARD CLUB. SEVERAL RUNS WILL BE MADE.

THE SHUTTLE BUS WILL ALSO BE AVAILABLE AT THE HARVARD CLUB TO TAKE PEOPLE BACK TO THE HOTEL.

February 5, 1983

PROGRAM

8:30-10:00 a.m.	BREAKFAST, SUMMATION
	Legislators, Regulators, Sponsors
10:00	ADJOURNMENT

Registered Participants

CONNECTICUT

Rep. Richard Balducci, Assistant Majority Leader
Rep. Julie Belaga, Assistant Minority Leader
Rep. William Candelori, Assistant Majority Leader
Senator William DiBella
Rep. Robert Gilligan, Assistant Majority Leader
Rep. John Groppo, Majority Leader
Rep. Kevin Johnston
Rep. Timothy Moynihan, Deputy Majority Leader
Rep. Alfred Onorato
Senator William Sullivan
Rep. John Woodcock

Stephen Gabriel, Legislative Commissioners Office

Robert Carrigher, Executive Assistant to Banking Commissioner
Commissioner Brian Woolf, Department of Banking

MASSACHUSETTS

Senator John Brennan
Rep. Ellen Canavan
Rep. Thomas Finneran
Rep. Andrew Rogers
Rep. Paul White
Rep. Philip Travis

Joseph Leonard, Senior Research Analyst, Committee on Banking
Joseph Martin, Administrative Assistant, Senator John Brennan
James McCormack, Senate Counsel, Committee on Banking

Paul Bulman, Acting Commissioner, Department of Banking
Edward Flynn, Department of Banking
Gerald Mulligan, Commissioner of Banking

William Gildea, Executive Director, New England Governors' Conference
Connie LaPointe, New England Governors' Conference

Stephen Leahy, New England Governors' Conference
George Sahady, New England Governors' Conference
Charles Tretter, New England Governors' Conference

Richard Syron, Senior Vice President, Federal Reserve Bank, Boston

John C. Hoy, President, New England Board of Higher Education

RHODE ISLAND

Rep. Roger Begin
Senator Guido Canulla
Senator George Lima, Deputy Majority Leader
Edward Blue, Commissioner of Banking

MAINE

Rep. Joseph Brannigan
Speaker John L. Martin
Rep. Patrick Paradis
Rep. Alfred Perkins
Senator Ronald Usher

VERMONT

Rep. Susan Auld, Majority Whip
Rep. Donald Marsh
Rep. Harold Weidman

Dennis Ellingson, Deputy Commissioner of Banking

NEW HAMPSHIRE

Rep. Roger Beliveau
Rep. Elizabeth Crory
Rep. Marshall French, Speaker Pro Tem
Rep. Paul LaMott

Gail Mullen, Office of the Speaker, John Tucker

A. Roland Roberge, Banking Commissioner

NEW YORK

Alan Sokolow, Executive Director, Council of State Governments Eastern Regional Conference

WASHINGTON, DC

Charlotte Staelin, Executive Director, New England Congressional Institute

Guests

Association of Bank Superintendents, Washington, DC
Bank of New England, MA
Boston University School of Law, Morin Center for Banking Studies, MA
Brockton Savings Bank, MA
Casco Northern Corporation, ME
Comptroller of the Currency, MA
Connecticut Bankers Association, CT
Connecticut Bank and Trust, CT
Connecticut National Bank, CT
Credit Union Association, Inc., MA
First National Bank of Boston, MA
Issues Management, Inc., MA
Interstate Cooperation Commission, RI
Maine National Bank, ME
Maine Bankers Association, ME
Massachusetts Bankers Association, MA
Massachusetts Urban Reinvestment Advisory Group, MA
Moseley, Hallgarten, MA
Mutual Savings Central Fund, Inc., MA
New Bedford Institute for Savings, MA
New Hampshire Association of Savings Banks, NH
New Hampshire Bankers Association
Rhode Island Bankers Association
Savings Bank Association of Connecticut, CT
Savings Bank Association of Massachusetts, MA
Shawmut Corporation, MA
Union National Bank, MA
Vermont Bankers Association, VT
Woonsocket Savings and Trust, RI
Worcester Savings Bank, MA

APPENDIX AA

New England Business (December 5, 1983)

THE NEW ENGLAND
BANKING FORUM

To most bankers, that joke is getting old—and maybe too serious. With deregulation of deposits, a wave of mergers and consolidations, intensified competition from non-banking companies with the *strangest* approaches . . . the banking business is red hot and getting hotter. It's more uncomfortable and challenging—fiercer and more *fun* —than any old-time banker could ever have imagined.

It really doesn't matter very much where you start—the economy, deregulation, interstate banking laws or regional banking laws—in the end a roomful of bankers will work their way around to the basic subject: Where will we be in a decade, and what will our business look like?

New England Business brought five of the leading commercial bankers of the region together this fall for a round-table discussion, with bank analyst Stanley T. Wells, a senior vice president of Keefe Bruyette & Woods Inc., acting as moderator. The bankers talked for two hours, with the proceedings tape-recorded.

What these bankers decided was, first, that of the approximately 14,400 commercial banks in the nation, only about 400 of them were in their league—operating primarily as commercial lenders and working with assets in excess of $500 million. (The average assets of these bankers was more than $3 billion, assuming the completion of mergers on the table, and in such company, such completions *are* assumed.) The second thing they made clear was that

none of them—not even Walter Connolly, who soon will be running the second largest banking company in New England, with assets in excess of $10 billion—would be even the slightest bit surprised to be working for Walter Wriston in a few years.... Through the long conversation, none ruled out the possibility of being acquired; several seemed to welcome the idea.

It's changing, fast.

But let them speak for themselves. The text of the conversations as presented here is edited and condensed, and taken out of sequence. We think it holds pretty straight to the meat of it.

THE PLAYERS: ———————————————————

Walter J. Connolly Jr.—chairman and chief executive officer of CBT Corp., holding company for the $5 billion Connecticut Bank & Trust Co. and soon to hold the same position with Bank of New England, into which CBT will be merged. Connolly's stockholders are temporarily a bit churlish, but his demeanor is that of a man who will, in a few moments, shake your hand and leave a $100 bill in your palm.

John P. LaWare—a Chemical Bank veteran who in 1980 joined Shawmut Corp. as the boss, now managing $5.5 billion in assets and now the second largest banking company in New England. A power in the Vault, the political nexus of Boston, and a canny player. He is made of oysters and guile.

James J. Preble—chairman and chief executive at First Connecticut Bancorp in Hartford, a fierce devotee of quality of earnings and one of the conspicuous non-players of the gotta-get-bigger game. Staying smaller, over the years Preble's nearly $1 billion bank has gotten richer, command-

ing a high multiple for a bank that many believe may—or may not—be one of the last to go. If it does, it will cost them.

Hilton E. Wick—the big man in Vermont, where he is chairman of Chittenden Corp., the state's largest commercial bank. Was the acquisition of Rutland Savings Bank last year a coup, or growth for its own sake? Is he painting the store to sell it? Hilton Wick likes full interstate banking legislation; if he's going to sell, he'd just as soon have a big auction. The Cheshire cat. They talked for two hours on the record, and nobody mentioned that Connolly's company owns 4.9% of Chittenden. (Wick later sold Bank of Boston a position convertible into 14% of Chittenden's equity.)

James E. Chandler Jr.—vice chairman at Indian Head Banks of Nashua, N.H., and, like Wick, a fierce supporter of full interstate bank legislation. Acts fully confident that he's going to win, too, and that if his stockholders will complain to him, it will be about the unfairness of capital gains taxes.

Stanley T. Wells—bank analyst and salesman *par excellence* and the most careful follower of the major banking scene in the region. A few days before the meeting, Indian Head Banks made private placements of new stock representing nearly 15% of its equity—all to other banking companies. Wells was the broker. If you want to buy a bank, look on his shelf.

Kenneth Hooker: Editor, goad.

Wells: The most common perception currently is that interstate banking is not only inevitable, but it is also just around the corner. Is this a valid opinion, and if so, how do you best prepare? Walter, your institution is involved

in one of the largest interstate banking consolidations in history. How do you compare the abilities to achieve economies of scale on an interstate basis, as opposed to the intrastate consolidations you've experienced in the past?

Connolly: Well, we're going to find out whether or not the economies are really there or not at some point, when our transaction with Bank of New England gets consummated. We haven't tried it, so it would be presumptuous to say that there are 16 tried and true ways to effect economies of scale by virtue of an interstate merger.

We've identified a number of things that we do to complement Bank of New England's activities, and a number of things that they do that complement our activities. But I wouldn't be honest if I didn't say that the jury is out.

Preble: I think there's no doubt that interstate banking is inevitable. I don't think you're going to see it as rapidly as others, perhaps, believe; it's a very controversial issue. As many bankers are as opposed to it as want it, and we're coming into an election year. I just can't see Congress tackling this tiger in 1984. So you can automatically shove it over to 1985. Congress is famous for ducking issues. We have six states in New England, and each one of the [interstate banking] laws is different. You're going to wind up with four that are looking for full interstate and two that are looking for restricted—Massachusetts and Connecticut.

Hooker: What happens if the courts don't wait for Congress? There is a lawsuit . . . .

Preble: Somebody's going to have to force Congress to take action. If you extended the logical nonsense, you're going to wind up with 50 different banking laws. Maybe when it gets fouled up enough, Congress will step up and do what they should have done a long time ago.

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APPENDIX BB

American Banker (December 15, 1982)

Counselor's Corner

ARE STATE LAWS PERMITTING INTERSTATE BANKING CONSTITUTIONAL?

By John D. Hawks Jr.

For those who believe as I do, that true interstate banking is more likely, at least in the short run, to come about through state action than through federal action, recent events reinforce that conviction. Congress appears to be as intransigent as ever on the subject. The states, by contrast, appear to be increasingly more willing to mitigate the harsh effects of the Douglas Amendment. As they do so, however, questions may be posed as to the validity of state laws intended to facilitate interstate acquisitions.

While the Depository Institutions Act of 1982—an 80-page encycyopedia of legislation—has been touted as the most far-reaching federal banking law in 50 years, it does virtually nothing to advance interstate banking. Indeed, at the one point at which the law even touches on the subject—in its exceedingly grudging provision for "extraordinary acquisitions" of failing banks—the new law dramatically evidences the hostility of Congress to interstate acquisitions.

It permits the Federal Deposit Insurance Corp. to arrange for an out-of-state takeover only where a bank with assets of $500 million or more is closed. Even then, the FDIC must afford the state bank supervisor in the failed

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John D. Hawks Jr. is a partner at Arnold & Porter, Washington. He is a former general counsel to the Federal Reserve Board.

bank's state an opportunity to object—even if the failed bank is a national bank. If such an objection is raised, the FDIC board must be unanimous in its approval of the transaction.

Once bids are received by the FDIC to take over the failed bank, the FDIC must, if the lowest bidder is an out-of-state institution, permit rebidding by any bidder whose original offer was within 15% or $15 million of the initial low bid.

Finally, in authorizing such "extraordinary" bank acquisitions the FDIC must give first priority to in-state bank acquirers and then must favor acquirers in adjoining states over those more remote—apparently on the premise that if the state is to be invaded by outsiders, it is better that the outsiders be neighbors.

States Ease Attitude

On the other hand, attitudes at the state level appear to be softening. In the recent past, both South Dakota and Delaware have permitted limited entry by out-of-state banking organizations—primarily those seeking a usury "haven." During 1982, New York, following Maine's lead of several years earlier, permitted acquisitions by out-of-state banking organizations whose home states afforded reciprocity. Also during 1982, Alaska permitted virtually unconditional entry by out-of-state organizations.

At this writing, several other states appear to be considering similar steps. A proposal for reciprocal entry seems to have some support in Kentucky, and Massachusetts appears about to enact a provision allowing entry from other New England states on a reciprocal basis.

As the states struggle to devise means of permitting some form of outside entry without opening the floodgates, interesting questions arise as to the constitutionality of conditional entry laws. If the states lift the Douglas-Amendment veil, to what extent may they discriminate among potential entrants and how onerous may they make the conditions of entry?

Carter Golembe—a brilliant economist and sage consultant who prudently conceals the fact that he has a law degree—believes that the states may not condition or limit entry in any way. While I disagree with Mr. Golembe, there are, I believe, some consitutional limits that must be reckoned with.

Constitutional Bars

The two most familiar federal constitutional constraints on state action, of course, are the Commerce Clause and the Equal Protection Clause. The former grants to Congress the power to regulate commerce among the several states and has been construed as a limit on the power of the states to enact burdens on interstate commerce. The latter prohibits the states from denying to any person within their jurisdiction the equal protection of the laws.

But for the Douglas Amendment—which, in practical effect, bars interstate acquisitions of banks by bank holding companies unless the target bank's state explicitly permits such acquisitions—state laws purporting to restrict in-state bank acquisitions by out-of-state banking organizations would almost certainly be held invalid under the Commerce Clause. Indeed, in Lewis v. BT Investment Managers Inc., 447 U.S. 27 (1980), the Supreme Court held that the Commerce Clause invalidated a Florida law intended to ban

out-of-state bank holding companies from operating investment advisory subsidiaries in Florida.

The court pointed out that the Douglas Amendment did not authorize the states to limit the nonbanking activities of bank holding companies; it merely granted authority to the states to create exceptions to the general federal prohibition against interstate bank acquisitions.

Since Congress has clear constitutional authority to regulate interstate commerce, the "burden" on interstate commerce that results where a state elects not to enact a law lifting the Douglas-Amendment bar, plainly presents no Commerce-Clause issue.

But what is the limit of state authority where a state does elect to relax the Douglas-Amendment bar? Is the Douglas Amendment properly read as an all-or-nothing law—that is, is the state's choice simply either to allow entry unconditionally or to allow the Douglas-Amendment prohibition to remain in full force? Or may the states permit entry on a limited or conditional basis?

Delaware Limits

The implicit assumption underlying most of the state "Douglas Amendment" laws enacted to date is that limitation and conditions are permissible.

The Delaware law, for example, limits entry to the acquisition of a single newly established bank, having initial capital of at least $10 million, no more than one office, and at least 100 employees.

In addition, the acquired bank must be operated in a manner and at a location such that it will not be likely to attract customers from the general public to the substantial detriment of existing Delaware banks.

South Dakota's law has comparable limitations similarly intended to assure that newly established bank subsidiaries of out-of-state bank holding companies will only be operated as usury havens.

By contrast, the Alaska law, which otherwise permits virtually unrestricted entry, prohibits acquisitions of de novo banks or banks that have not been in operation for at least three years. This condition, which has its counterpart in many state laws regulating the in-state expansion of bank holding companies, is presumably intended to preserve the value of existing franchises by requiring out-of-state entrants to deal with the owners of banks in operation, rather than sponsoring their own entry vehicles.

Whether such restrictions are valid would seem to depend—at least so far as the Commerce Clause is concerned—upon the intent of Congress in enacting the Douglas Amendment. Many cases have held that Congress may authorize the states to restrict interstate commerce in a way that would be unconstitutional absent a congressional sanction. In the Lewis case itself the Supreme Court noted that "Congress, if it chooses, may exercise [the power to regulate the flow of interstate commerce] indirectly by conferring upon the states an ability to restrict the flow of interstate commerce that they would not otherwise enjoy."

What did Congress intend? The Douglas Amendment is silent on the question of whether state laws permitting limited or conditional entry would be permitted. In the Lewis case, the Supreme Court used some very broad language that could be viewed as relevant in this regard.

It expressed doubt that the Douglas Amendment "authorizes state restrictions of any nature on bank holding company activities. The language of the statute establishes

a general federal prohibition on the acquisition or expantion of banking subsidiaries across state lines. The only authority granted to the states is the authority to create exceptions to this general prohibition, that is, to permit expansion of banking across state lines where it otherwise would be federally prohibited."

While this language could be construed to reflect a view that only unconditional entry is permitted, I believe it was not intended to be so broad. In the context of the issue being discussed by the court—namely, whether a state may restrict the non-bank activities of an out-of-state bank holding company—the court was simply rejecting the argument that the Douglas Amendment confers authority upon the states to impose such restrictions. It was not presented with the issue—and therefore had no need to address the issue—of whether the Douglas Amendment permits the imposition of conditions on acquisitions of the banks.

Unlike the statute itself, Sen. Paul Douglas was not silent on the issue. In explaining his amendment on the floor of the Senate, he stated that its purpose was to "permit out-of-state holding companies to acquire banks in other states only to the degree that state laws expressivly permit them." He thus seems to have assumed that the states might vary in the degree to which they would permit out-of-state bank holding companies to enter.

Congress certainly must have anticipated that the states would be concerned about the impact of such entry on local banks and on the local banking structure. Indeed, protection of this state interest was a moving force behind the Douglas Amendment.

Since Congress was willing to allow the states to bar entry of out-of-state banks entirely, by simply failing to

enact legislation permitting entry, it hardly seems that Congress would have intended to preclude the states from permitting entry—which, after all, tends to promote interstate commerce—in a manner that would nevertheless be reasonably protective of in-state banks.

If Congress did not intend to preclude the states from relaxing the Douglas-Amendment bar in a partial or conditional manner, as seems likely, then it is difficult to see why such limits or conditions should be viewed as inconsistent with the Commerce Clause.

This is not to say, of course, that limiting conditions may not run afoul of other constitutional restraints. It is entirely conceivable, for example, that a state might adopt entry conditions that were so unreasonably discriminatory as to violate the Equal Protection Clause.

In fact, an Equal-Protection-Clause challenge was mounted against Iowa's 1972 Douglas Amendment law, which permitted out-of-state bank holding companies to acquire banks in Iowa only if the acquiring company owned at least two banks in Iowa prior to the enactment of the law. Only one out-of-state company qualified under the Iowa law, and when that company was granted approval for an Iowa acquisition by the Federal Reserve Board, the Iowa law was challenged as a denial of equal protection.

The reviewing court rejected the challenge, however, stating that it was "perfectly rational" for the Iowa legislature to determine that the sole beneficiary of the law "has proven itself to be a positive force" in Iowa banking so as to allow it to compete in Iowa on the same basis as other Iowa banks, and that "the state would not be well-served if out-of-state bank holding companies were allowed wholesale entry into the Iowa market." Iowa Independent

Bankers v. Board of Governors of the Federal Reserve System, 511 F.2d 1288, 1294 (D.C. Cir.), cert. denied, 423 U.S. 875 (1975). The court thus sustained the power of the states to be reasonably selective in permitting entry by out-of-state holding companies.

Limits of Selectivity

But what are the limits of selectivity? Could a state limit entry by conditions relating to the size of the acquiring bank, for example? Is it "rational" for a state to select among out-of-state entrants solely on the basis of whether the prospective entrant's home state permits reciprocal entry?

Certainly the concept of reciprocity carries with it some basic sense of fairness. But the connection between a state's interest in regulating banking within its borders and its interest in securing reciprocal entry rights for its own holding companies in other states is not entirely clear.

Reciprocity becomes even more questionable as a basis for distinguishing among out-of-state entrants when further limitations, such as those now being considered in Massachusetts, are imposed, where the effect of the limitations is to preclude many states from eligibility for reciprocity. What is the constitutional rationale for limiting entry only to those holding companies from other New England states that permit reciprocal entry? A shared taste for milky clam chowder may not be sufficient to warrant discrimination against those favoring the tomato-based variety.

Quite apart from issues that may be raised under the Equal Protection Clause, discriminatory reciprocity pro-

visions conceivably could give rise to questions under a more obscure provision of the Constitution—the Compact Clause. Article I, section 10 of the Constitution provides that "no state shall, without the Consent of Congress . . . enter into any agreement or compact with another state, or with a foreign power. . . ."

This clause, which was carried over from the Articles of Confederation, has its roots deep in colonial history, reflecting the requirement that the approval of the king be obtained, as a matter of crown prerogative, for the final resolution of boundary disputes between colonies. The draftsmen of the Articles of Confederation, concerned that the authority of the confederacy not be eroded by interstate agreements, required the consent of Congress for interstate agreements.

The Supreme Court has made clear that the Compact Clause was not intended to reach every possible interstate agreement, and it has upheld a variety of interstate agreements effected through reciprocal legislation. Nevertheless, the court has said that interstate agreements effected through reciprocal legislation could present concerns of a sort that the Compact Clause was intended to reach. It is possible that if two states—or a group of states, such as those in New England—enacted reciprocal legislation tailored to permit mutual entry by one another's banks—and no others—such action could be considered as giving rise to a compact requiring the consent of Congress.

Encroachment on Federal Prerogative

The Supreme Court has said on a number of occasions that the intent of the Compact Clause was to reach those interstate agreements that would have a tendency to in-

crease the political power of the states in a way that would encroach upon the prerogatives or supremacy of the federal government. How, it may be asked, would this test apply to limited reciprocal legislation such as that being considered in Massachusetts?

On the one hand, it could be argued that since Congress decided in the Douglas Amendment to leave to the states the decision whether to permit interstate bank acquisitions by bank holding companies, no federal interests are impaired and federal supremacy is not threatened when two or more states jointly undertake to exercise the authority granted to them by Congress.

On the other hand, the creation by the New England states of a six-state banking zone within which interstate expansion is permitted by agreement of the participating jurisdictions, and from which outsiders are excluded, may be seen as giving rise to a type of political confederation that is inconsistent with federal supremacy.

In one old Supreme Court case involving the Compact Clause, the court, quoting Story's "Commentaries on the Constitution," indicated that the consent of Congress may properly be required for interstate "treaties of confederation in which the parties are leagued for mutual government, political cooperation, and the exercise of political sovereignty . . ." Virginia v. Tennessee, 148 U.S. 503, 519 (1893). "Balkanization" of banking through narrowly limited reciprocal-entry legislation could be seen as presenting such concerns.

Consideration of the Compact-Clause issue prompts the question of why the New England states do not in fact form a compact and seek approval from Congress. If there is a legitimate regional interest in permitting New

England banks to expand within New England without regard to state boundaries, formation of an interstate compact agency to regulate expansion might be an effective means of promoting that interest.

It is even conceivable that the federal government might become a party to such a compact, as it did, for example, in the case of the compact establishing the Delaware River Basin Commission. Such a federal-state compact could provide an efficient means for coalescing national, regional, and local interests in bank expansion—and eliminating any legal doubts at the same time.

APPENDIX CC

Maine Sunday Telegram (March 13, 1983)

NEW ENGLAND PREPARES FOR REGIONAL BANKING

By Rebecca Morris
The Stamford Advocate

Boston—Within two or three years, the First National Bank of Boston could be dealing out loans and cashing checks in Waterbury, Conn., while Connecticut Bank and Trust does the same in Providence R.I.

The six New England states are about to embark on a regional banking experiment that would allow bank holding companies in one New England state to buy banks in any of the other states.

Federal law prohibits such boundary-crossing unless the states permit it, and most of the region's top banks are pushing the state legislatures to bring down the geographical barriers.

They reason that national interstate banking is coming soon anyway, raising the prospect of competition from the giant New York City banks. A limited experiment on the New England banks' home turf would allow them to grow and consolidate forces before trying to survive against New York banks, some of which have more assets individually than all of the New England banks combined.

(Another installment in the process of change toward regional banking in Maine occurred last week when the Casco Northern Corp., Maine's largest bank holding company, announced that it had agreed in principle to become part of the First National Boston Corp. Under the agree-

ment Casco would become an affiliate of First National Boston, with the Massachusetts company holding 25 percent of Casco's stock.)

(Other bank takeovers in Maine currently under way involve New York banks. Norstar Corp. of Albany is to assume control of Northeast Bankshare Association of Portland and Key Banks of Albany is taking over Depositors Corp. of Augusta.)

The regional experiment is an idea that some observers think will be duplicated in other culturally homogeneous regions. And it is likely, they say, that New England's experience will play a major role in determining how and when interstate banking is expanded nationwide.

Meeting in Boston earlier this month with bank officials and regulators, the Caucus of New England State Legislatures encouraged the states to act quickly by endorsing a regional banking system. If the individual legislatures approve, industry officials say, the likely result will be more concentration of financial assets among the region's largest bank holding companies, and a wider range of services for customers, especially in smaller communities.

There are about 14,000 commercial banks and about 42,000 financial institutions nationwide that accept deposits. Industry officials say that number will be greatly reduced during the next decade, in part because of interstate acquisitions.

In other ways, however, the changes may not be as dramatic as they sound. Most banking services—except retail deposits—already move across state lines.

Many states allow out-of-state banks to compete with home-town-banks by establishing loan offices. New York's Citicorp, for example, has such an office in Westport, Conn.,

and Manufacturer's Hanover has one in Norwalk, Conn. And bank officials argue that computer technology, which has generated nationwide automatic teller networks, is making geographical barriers meaningless.

For those reasons, said Brian Woolf, Connecticut's banking commissioner, national interstate banking is inevitable. But regional banking "may be the intermediate step so as to give our institutions time to develop strategies for competing in the interstate market and helping to shape their own destinies."

Two New England states already allow reciprocal banking arrangements across state lines. In December, Massachusetts passed a law inviting bank holding companies in the other five New England states to acquire its banks if those states grant Massachusetts companies the same right. Maine has had a similar law since 1975, although it allows banks to come from any state.

Connecticut's Interstate Banking Commission endorsed a regional system—specifically excluding the New York banks—on Jan. 5, and a bill to accomplish that is now pending in the state Legislature. Similar bills are being considered in Rhode Island, New Hampshire and Vermont. Outside New England, Alaska, Delaware, Iowa, New York and North Dakota already allow some form of interstate banking.

Several New England banks, expecting the legislatures to approve the regional system, have already positioned themselves to take advantage of the change by acquiring a 4.9 percent voting interest in out-of-state banks, the maximum allowed under current law.

The only organized challenge to the regional banking proposal is coming from the New York City banks, which

are anxious to move across the Connecticut border into the lucrative Fairfield County market, where hundreds of large companies have their headquarters and thousands of their wealthy employees live.

Harold Read, a Hartford, Conn., attorney who represents Citicorp, said the New York banks are likely to challenge the constitutionality of limiting interstate banking to certain states. Read said they will argue that under federal law, states may decide to invite out-of-state bank holding companies into their territory, but may not limit the invitation to certain states. Such a limit would interfere with interstate commerce—a province of federal government.

The New York banks' challenge poses other questions. There are two axioms in the industry about interstate banking. One is that any bank, large or small, will survive if it is well-managed, aggressive, and serves its customers well. The other is that removing state barriers will increase competition, resulting in better-packaged products, lower prices and better service to the consumer.

If all this competition is so healthy, why keep the New York City banks out, as Massachusetts has done?

"It's obvious why they did it," said Roger Castonguay, president of Northeast Bankshares in Maine. "They did it because if it were open on a nationwide basis, they're afraid they'd get gobbled up by the New York banks."

APPENDIX DD

The New York Times (April 3, 1983)

Brouhaha in Yankee Banking
Enlivening Banking for Fun and Fireworks

"Who," the New York banker inquired ever so politely, "is that man Brennan?"

A lot of bankers are asking that question nowadays because Massachusetts State Senator John A. Brennan Jr. is the author of the New England interstate banking plan.

To hear the 38-year-old Mr. Brennan tell it, he is a lawyer from a poor family in the suburban-Boston city of Malden and he never really cared very much about banking. So little did he care, he says, that he got downright bored after he was named chairman of the state's Senate Banking Committee. So, he simply looked around for a few nice issues to liven things up.

Two years ago he shepherded a bill through the Massachusetts Legislature that allowed state thrift institutions to offer many of the same services as do the state's commercial banks. Then things began to get boring again.

That is, until he read some reports about interstate banking. "Why not," he recalls asking himself, "start up a regional banking system right here in New England? I mean, history shows there are six states only by accident and there really should have been one big state." One thing Mr. Brennan, a Democrat, had not bothered to do at the beginning of his latest effort to overcome his boredom was to ask Massachusetts bankers what they thought of the idea.

"Honestly, I didn't," he says. "I just didn't think it would be good for the state if the big money center banks came in here. Our banks need the space to grow first." He also talks vaguely about jobs and the possibility of outside banks acquiring New England banks and consolidating clerical operations elsewhere, regional protectionism in its many forms.

To be sure, the Massachusetts bankers were not idle for long. It was they who inserted the anti-leap-frog clause, which prevents an outside bank from acquiring a bank in, say, Maine and using it to get into the rest of the Bay State. After prodding the interstate banking bill through the Massachusetts Legislature in December, the ambitious Mr. Brennan set up a conference in Boston of key legislators and bankers from all over New England. There, he told them why they should join the Massachusetts plan and set up a real New England system.

Since then, he has testified at hearings on interstate legislation in Connecticut and Rhode Island and is doing his share to get the Massachusetts-like bills passed there.

"This has been a real challenge," he says, leaving open the question of what he plans to do after that work is done and he gets bored again.

APPENDIX EE

Press Release (April 6, 1983)

TSONGAS AND FRANK INTRODUCE NEW ENGLAND INTERSTATE BANKING ACT

Senator Paul E. Tsongas (D-Mass.) and Congressman Barney Frank (D-Mass.) today announced the introduction of the New England Interstate Banking Act of 1983. The legislation is designed to authorize interstate banking activities between six New England states.

The purpose of this legislation, according to Tsongas and Frank, is to follow up on laws passed last year in Massachusetts, and earlier in Maine, which allow interstate banking in New England among states which choose to enact reciprocal legislation. It would give explicit federal acknowledgement to these state laws, or to similar interstate banking laws which are now being considered in several other New England states.

"It is important to note that this bill respects the decision making authority of the states," the Massachusetts lawmakers explained. "It only authorizes in federal law the activities which are specifically allowed by the laws of the states involved. A state could not be forced to accept interstate banking—it would have to act affirmatively in order for this legislation to have any effect within its borders."

The bill permits banks, savings banks, and savings and loan associations whose main offices are located in a New England state to establish branches in other states within the region where state laws allow. It would direct the Federal Reserve Board to give effect to state laws permit-

ting acquisitions across state lines in New England by bank holding companies. It gives similar direction to the other federal regulators in reviewing merger transactions involving banks, thrifts or holding companies within New England. The measure would expire in five years unless extended by Congress.

"States in New England are recognizing the need to remove geographical barriers in order to give financial institutions the ability to compete effectively in today's rapidly changing markets," Tsongas and Frank said. "But the consumer will be the ultimate beneficiary as new products and services can be offered more widely."

"We understand," they concluded, "that there is concern about the possible effects of national banking. That is why this legislation is drawn to encompass only the New England states where there is a regional and community identity. We believe this is a fair and balanced approach to this question."

Both stated that they would expect banks to be sensitive to local needs and would use their offices to ensure that larger banking units would maintain that sensitivity.

Frank is a member of the House Committee on Banking, Finance and Urban Affairs. Tsongas has been a frequent proponent of bank reform legislation. The New England states include Massachusetts, Rhode Island, Maine, Connecticut, New Hampshire and Vermont.

APPENDIX FF

United Press International Report (October 27, 1983)

SECTION: Regional News

DISTRIBUTION: Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont

DATELINE: BOSTON

The biggest interstate banking merger in New England history—between Bank of New England and CBT Corp. of Hartford—was approved by Paul E. Bulman, the Massachusetts banking commissioner.

The merger, announced late Tuesday, creates the second-largest bank holding company in New England, after Bank of Boston.

While the Connecticut bank commissioner has accepted the merger, it must be approved by the Federal Reserve Board in Washington.

Officials at both Bank of New England and CBT Corp. said an objection to the merger filed by Citicorp of New York would not hinder the deal.

The Smaller Business Association of New England, during a September public hearing, feared interstate bank mergers might limit credit available to small business.

But Bulman said the merger would not cause a "deleterious increase in the concentration of commercial banking resources either in Massachusetts or New England."

APPENDIX GG

Federal Reserve Press Release (August 20, 1984)

For immediate release

The Federal Reserve Board today announced its approval of the application of Bank of Boston Corporation, Boston, Massachusetts, to acquire the successor by merger to RIHT Financial Corporation, Providence, Rhode Island, and thereby indirectly to acquire Rhode Island Hospital Trust National Bank and Columbus National Bank of Rhode Island, both located in Providence, Rhode Island.

APPENDIX HH

Brief of the Board of Governors of the Federal Reserve System to the United States Court of Appeals for the Second Circuit (May 4, 1984) (Excerpt)

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 84-4047

NORTHEAST BANCORP, INC. et al.,

Petitioners,

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

Respondent.

Nos. 84-5051 and 84-5053

CITICORP,

Petitioner,

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

Respondent.

On Petition for Review of Orders of The Board of Governors of the Federal Reserve System

BRIEF OF RESPONDENT

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In accordance with the directives of the courts that the role of the agency is to provide its guidance[10] or its views[11] to assist the courts in resolving constitutional issues, the Board has set forth in its Orders and the Appendix to those Orders, detailed findings on the constitutional issues. As the Board concludes, the evidence is not so clear and unequivocal as to justify a denial of the subject applications by the Board on the basis that the state statutes authorizing the transactions are invalid. While the Board has initially considered the constitutional questions raised by the Connecticut and Massachusetts statutes, it is ultimately for the courts to decide such issues. See *Plano* v. *Baker,* 504 F.2d at 599; *Finnerty* v. *Cowen,* 508 F.2d 979 (2d Cir. 1974).

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10. *Plano* v. *Baker,* 504 F.2d 595, 599 (2d Cir. 1974).

11. *Robinson* v. *U.S.,* 718 F.2d 336, 338 (10th Cir. 1983).

APPENDIX II

Statement of Paul A. Volcker, Chairman, Board of Governors of the Federal Reserve System (March 27, 1984) (Excerpt)

Statement by

Paul A. Volcker

Chairman,

Board of Governors of the Federal Reserve System

before the

Committee on Banking, Housing and Urban Affairs

United States Senate

March 27, 1984

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Before my concluding remarks, I would like to comment specifically on the provisions contained in Title X on regional interstate banking.

Title X provides specific authority, for a five-year period, for states to authorize regional interstate banking acquisitions. Such legislation would presumably resolve the question of the constitutionality of regional arrangements that have been authorized in New England and have been proposed in a number of other areas of the country. Yesterday, the Board approved two bank holding company mergers under the reciprocal arrangements of Massachusetts and Connecticut. Although there is a strong argu-

ment that these state laws are not consistent with the prohibitions against discriminatory burdens on interstate commerce established by the Commerce Clause of the Constitution, there is an absence of clear and unequivocal evidence to that effect. Consequently, the Board proceeded on the assumption of constitutionality and applied the criteria of the Bank Holding Company Act. But plainly, the differing constitutional interpretations raised by parties to merger applications demonstrates the need for Congressional action to clarify this issue at this time.

We believe this is all the more important because of our concern about the permanent establishment of regional banking areas. If Congress should decide to endorse regional arrangements, in our view it would be desirable to limit them to a transitional period. We would also urge you to consider the interstate banking question more broadly at an early date, once the powers issues are settled.

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APPENDIX JJ

Statement of Paul A. Volcker, Chairman, Board of Governors of the Federal Reserve System (April 4, 1984) (Excerpt)

Statement by

Paul A. Volcker

Chairman,

Board of Governors of the Federal Reserve System

before the

Subcommittee on Telecommunications,

Consumer Protection and Finance

of the

Committee on Energy and Commerce

United States House of Representatives

April 4, 1984

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Interstate Banking

The geographic scope of depository institutions has long been a key question of federal-state relations. The proliferation of nonbank affiliates of bank holding companies operating across state lines, loan production and "Edge Act" offices, integrated national markets for money and credit at the wholesale level, the current action of some

states themselves to permit entry of out-of-state banking organizations, and the broadened power of thrift institutions able to operate interstate have by now led to interstate banking de facto for many banking services. But, as a general matter, we have still prohibited on an interstate basis the provision of an integrated range of services in a single office, and we force particular activities into "unnatural," and less efficient, channels. Even in the consumer area, restrictions are rapidly breaking down. Recently, we were compelled by existing law to approve the acquisition of a Florida "nonbank bank," designed to engage in a full range of deposit-taking and consumer lending, by an out-of-state bank. We simply, under the provisions of the Bank Holding Company Act, felt we had no alternative.

We sorely need a fresh Congressional review of our entire policy toward interstate banking. While most of the issues in this controversial area will need to be held over to a later Congress, the present movement toward regional interstate banking arrangements does need to be dealt with now. Just last week the Board approved two bank holding company mergers under the reciprocal arrangements of Massachusetts and Connecticut, even though there are serious questions both about the constitutionality of such arrangements and their implications for public policy. If Congress wishes to support these regional arrangements, appropriately limited to a transitional period, legislation explicitly authorizing that approach should be enacted.

Conclusion

The legislative framework governing the banking system is sorely in need of change—change that can take account of the vast changes in the environment for the con-

duct of banking and our future needs. After long discussion and debate, the time is ripe for action. I believe there is a wide area of "conceptual" consensus, and agreement on a critical "core" of legislation—on the definition of a bank and a qualified thrift and on regulatory simplification—is clearly within grasp. The remaining issues surrounding the particular powers of a bank holding company are inevitably more controversial, but nonetheless ready for decision. We should not confuse lack of agreement among affected industry interests with absence of necessary information and argumentation. Workable approaches responsive to the various concerns elicited by months of debate and study can be developed in this legislative session.

APPENDIX KK

Remarks by Emmett J. Rice, Member, Board of Governors of the Federal Reserve System (June 21, 1984) (Excerpt)

PROGRESS TOWARD INTERSTATE BANKING

Remarks by

Emmett J. Rice

Member, Board of Governors of the Federal Reserve System

before

The National Association of Urban Bankers

New York City

June 21, 1984

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Finally, we come to the issue of regional interstate banking based on state action. Chariman Volcker expressed the Board's concerns over this route to interstate banking in his congressional testimony on September 13, 1983. At that time, he expressed the view that regional banking would be a new form of Balkanization of the banking industry. Inconsistencies are already developing as states select their regional partners. For example, the Georgia law would allow entry by Kentucky banks, but the

Kentucky law only allows entry by banks in states immediately adjacent to Kentucky.

Second, the regional laws clearly discriminate against those states that are headquarters for the nation's largest banking organizations. None of the proposed regional zones would include New York. Utah's law allows reciprocal entry from Hawaii and all the Western states except California. Not surprisingly, the constitutionality of these laws is being challenged, and Board approvals of applications under the regional laws are being stayed pending court decisions. Constitutional issues include the need for congressional ratification of interstate compacts, the creation of new barriers to interstate commerce, and the issue of equal treatment under the law. Various bills in the Congress would attempt to remove the constitutional uncertainty surrounding these state laws, and ultimately the Congress and the courts will have to resolve these questions.

Two principles are involved in this conflict. First, we have the right of a state to determine its own banking structure, as provided by the McFadden Act and the Bank Holding Company Act. Second, there is the issue of the effect of one state's actions on the other states. Once a state exercises its option under the Bank Holding Company Act to allow entry by out-of-state firms, can it then discriminate among the states? Or, must allowing out-of-state entry be an all states or no states proposition? These are difficult questions and their resolution by the courts may produce landmark decisions on states' rights and the national interest.

In addition to the objections raised by Chairman Volcker, I have problems with the concepts underlying the rush to pass regional interstate banking laws. These laws

are clearly designed to permit mergers among the largest banks within each region. Thus far, the bulk of the interstate activity has consisted of the acquisition of relatively large firms by even larger firms. Because the merging banks did not compete in the same geographic markets, the antitrust laws did not prevent their merger.

There has been no demonstration of any public benefits from regional interstate banking. The proponents claim that regional banking will lead to faster regional economic growth, but there is no evidence that there is any relationship between banking structure and economic development. They claim that the merging banks will achieve economies of scale, but there is no evidence to support that opinion. They claim that by growing larger they will be in a better position to survive the eventual entry of the nation's largest banks. However, there is no evidence that the regional banks need to be larger to survive. Survival is the result of providing good service at competitive prices and there is no evidence to suggest that this is directly related to the size of the organization. The advocates claim that larger banks can better serve the needs of large businesses, but there is no evidence that the credit needs of large business firms are not being met. In summary, there is no evidence to support the claims of the proponents of regional banking.

Regional bank mergers would have some negative impact on the aggregate concentration of banking resources in the nation. Many of the banks that would be involved in these mergers are among the largest banks in the country. In addition, if large regional organizations are formed now, and full interstate banking is allowed in a few years, the potential acquisition of the regional organizations by

the national firms would lead to an even further concentration of banking resources.

Thus, while regional interstate banking does serve as a means of transition from state limitations on geographic expansion to full interstate banking, I think the transition period should be very short. The enactment of a national law with controls on large bank mergers would provide uniform expansion rules before intraregional large bank mergers set the stage for the increased concentration of banking resources.

To conclude my comments, let me again stress the important points. First, interstate banking is probably inevitable given the developments of the past few years. Second, while the arguments in its favor are not very strong, there is some potential for social gain. Third, the transition should take place on a level playing field under rules that do not disadvantage banks relative to their nonbank competitors. Fourth, the rules for interstate banking should be established by the Congress. Loopholes in the laws, such as those that allow nonbank banks, should not be the basis on which interstate banking develops. Finally, any system of interstate banking should contain effective constraints against mergers and acquisitions that would increase the concentration of banking resources and leave the nation's financial system dominated by a handful of giant nationwide banking organizations.

APPENDIX LL

Statement of C. T. Conover, Comptroller of the Currency (March 21, 1984) (Excerpt)

STATEMENT OF

C. T. CONOVER
COMPTROLLER OF THE CURRENCY

Before the

COMMITTEE ON BANKING, HOUSING AND URBAN AFFAIRS

UNITED STATES SENATE

March 21, 1984

* * *

Title X—Interstate Banking

This title would authorize states to adopt interstate banking and branching standards subject to reciprocity or regional or other geographical limitations. The interstate authorizations would be temporary, expiring after five years, unless the required Presidential report to Congress would recommend otherwise.

In the past, we have consistently supported geographic deregulation of banking. Such deregulation, coupled with relaxed product powers, will significantly enhance competition in the financial marketplace. The direct benefits of increased competition among financial services institutions will be a wider range of consumer choice and a climate conducive to industry innovation.

In addition to Title X, several other bills have been introduced which also propose geographic deregulation:

- Title X is an expanded version of Sen. Tsongas' "New England Interstate Banking Act of 1983" (S. 1002) which would authorize regional or reciprocal arrangements by the New England states only.
- Sen. Mattingly's "Interstate Banking Act of 1983" (S. 2113) is also an expanded version of S. 1002. It would permanently permit any state to authorize interstate banking. Although the bill in its operational provisions does not explicitly refer to reciprocity or regional conditions, it recognizes, in general terms, that legislation including a reciprocal or regional limitation would be considered to be enacted pursuant to the power of Congress to promote interstate commerce.
- Sen. D' Amato's "Banking Geographic Deregulation Act of 1983" (S. 2107) would repeal the Douglas Amendment after five years. During the five-year phase-in period, it would allow bank holding companies to establish or acquire, each year, one bank in two states. This bill would affect bank holding companies only.

While we would prefer more extensive geographic deregulation, we also welcome any—even partial—relaxation of the current restrictions. For instance, authorizing reciprocal or regional expansion may be a reasonable first step in the direction of nationwide interstate banking.

Title X amends the current Bank Merger Act to authorize interstate mergers of banks to involve a bank from another state if such mergers are explicitly authorized by the statute of the other state. However, Title X fails—by apparent oversight—to amend 12 U.S.C. 214-214c, which

authorize the conversion, merger or consolidation of national banks with state banks, and sections 215-215b, which authorize the consolidation or merger of national or state banks into national banks. These sections currently confine conversions, mergers or consolidations to the state in which the national bank is located. To achieve the intended purpose of Title X (and to create parity with the expanded merger authority of bank holding companies and thrift institutions), a specific amendment of these provisions is necessary. Again, we would be happy to provide drafting assistance in this respect.

APPENDIX MM

Affidavit of Carter H. Golembe (September 29, 1983) (Excerpt)

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Civil Action No. H-83-654(TFGD)

NORTHEAST BANCORP INC. AND UNION TRUST COMPANY,

Plaintiffs,

against

BRIAN J. WOOLF, Banking Commissioner of the State of Connecticut,

Defendant.

City of Washington
District of Columbia } ss.:

CARTER H. GOLEMBE, being duly sworn, deposes and says:

1. I am a Senior Associate and Chairman of the Board of Golembe Associates, Inc. I make this affidavit in support of Plaintiffs' cross-motion for summary judgment in the instant action.

2. Golembe Associates, Inc. was founded in 1966 and is based in Washington, D.C. It provides professional consulting services to the financial industry in the area where

economics, law, and government meet to affect participating institutions. Golembe Associates, Inc. has a staff of more the 50 and provides professional services in the following areas: merger and acquisition consulting; financial advisory services; government affairs consulting; strategic planning; economic and public policy research; and deposit base valuations. A more complete description of the firm is found in the Annual Report attached as Exhibit A.

3. I received my Ph.D. in Economics from Columbia University and a Bachelor of Law from George Washington University. Prior to founding Golembe Associates, Inc. in 1966, I served as Deputy Manager of the American Bankers Association, and was a financial economist with the Federal Deposit Insurance Corporation from 1951 to 1960. I also served as special assistant to Senator Wallace F. Bennett during a portion of this period. I have written extensively on banking matters and am the principal author of the "Golembe Report," a series of interpretive reports on major public policy issues. I am co-author of *Federal Regulation of Banking* (Golembe Associates, 1983), a college-level textbook now in its third edition.

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I. *Government and Banking*

10. In the almost two hundred years since the adoption of the U.S. Constitution, no subject has excited more political emotion or raised more sensitive issues of federal and state prerogatives than banking. It was probably for this reason that neither banks nor the business of banking were mentioned by the drafters of the Constitution, the subject being deemed so controversial as to raise the

spectre of rejection of the new constitution should it be addressed. Yet in the economic and financial system that evolved over the following several centuries, the exercise of the monetary powers of government (and, more specifically, control of the banking system) has often raised issues of constitutional significance. This is the case today with the Interstate Act.

11. From the beginning, there was never any question that the monetary power—essentially control over the circulating medium—was and is a significant element of government sovereignty. As Bray Hammon put it, in his classic study of American banking: "[i]n terms of the Constitution and of common sense, control of the monetary system irrefragably belonged to sovereignity . . ."[1] Rather, the question was where that sovereignty lay—in the newly organized federal government or in the states. Was the federal government a mere creation of the states, limited to the exercise of the powers specifically granted it while the states, remaining sovereign, were the holders of all powers not relinquished? Or was the federal government sovereign, fully capable of exercising all of the indicia of sovereignity, whether explicitly or implicitly based on the words of the Constitution? It was the latter position that was taken by the first Secretary of the Treasury, Alexander Hamilton, when in one of the most significant monetary events in the nation's history he urged President Washington to approve the chartering by the federal government of the Bank of the United States:

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1. Hammond, Bray, *Banks and Politics in America,* (Princeton, New Jersey: Princeton University Press, 1957), p. 723.

> [T]his general principle is inherent in the very definition of government, and essential to every step of the progress to be made by that of the United States, namely: That every power vested in a government is in its nature sovereign, and includes, by force of the term, a right to employ all the means requisite and fairly applicable to the attainment of the ends of such power, and which are not precluded by restrictions and exceptions specified in the Constitution, or not immoral, or not contrary to the essential ends of political society.[1]

And it was Thomas Jefferson, among others, who took quite the opposite view in opposing, unsuccessfully, the federal government's first entry into the banking business, and entry probably intended to have, and certainly having in fact, the effect of exercising control over state banking institutions.

12. The matter of government sovereignity and the monetary power was not settled in 1791. Several decades later, in the early 1830s, the pendulum swung quite far in the other direction when President Jackson, with the support of agrarians and business entrepreneurs, destroyed the second Bank of the United States. To be sure, Chief Justice John Marshall, in *Craig v. Missouri* had made it quite clear in 1830 that under the Constitution the states could not furnish the nation's circulating medium through the issuance of bills of credit, or by instruments similar

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1. Opinion of Alexander Hamilton, February 23, 1791, in *Documentary History of Banking and Currency in the United States*, Ed. Herman E. Krooss (New York: McGraw Hill, 1969), p. 279.

in nature but passing under a different name.[1] His decision was thought to foreshadow the eventual end of state chartered banks—institutions that obviously were creatures of the states and that were, in fact, providing much of the nation's circulating medium in the form of banknotes and deposits. Yet in 1837, after Chief Justice Marshall's death, the Supreme Court in *Briscoe v. Bank of Kentucky* held that notes issued by state banks and used as circulating medium were not violative of the U.S. Constitution.[2] Because the charter of the second Bank of the United States had expired in 1836 and was not renewed by the federal government, *Briscoe* meant that, for all practical purposes, the monetary power of government had been finally lodged in the states, where it resided for the next three decades.

13. It was probably inevitable that the pendulum would swing again, returning to Hamiltonian doctrine. The immediate cause for this event was the Civil War. The North entered the war without a monetary system of its own and, indeed, with little if any control over the state banking system. It ended the war with its own banking system in place and had set the scene for restoration to the federal government of that element of sovereignity implied in power over the circulating medium. That power has resided in the federal government ever since.

14. The federal government created its own system of banks (i.e., national banks) in 1863. It issued its own currency during the war (the so-called Greenbacks) which the

1. 29 U.S. (4 Pet. *408) 249 (1830).

2. 36 U.S. (11 Pet. *256) 207 (1837).

Supreme Court eventually found to be constitutional in the *Legal Tender Cases* in 1870.[1] The *Briscoe* decision of 1837 was essentially overturned (or at least ignored) in 1869 (*Veazie Bank v. Fenno*) when the Court held that a prohibitive tax laid by Congress on state banknotes, in an effort to assure the primacy of federal circulating medium and to eliminate state banks, was constitutional.[2] To an economist at least, it would seem that even the existence of state banks is a matter of federal grace rather than constitutional privilege; a prohibitive tax on the note liabilities of state banks could as well be applied to the deposit liabilities of the same institutions.

15. In any event, Congress established a central bank in 1913 and insurance of bank deposits by an agency of the federal government was enacted in 1933. The constitutionality of the former had been settled many years before, in *McCulloch v. Maryland*[3]; the constitutionality of the latter (deposit insurance) was upheld in *Doherty v. United States.*[4]

16. It is of interest, and of some possible significance to issues raised by the Interstate Act, that the courts have gone beyond the narrow monetary clause of the Constitution to fix the constitutional locus of the monetary power held and exercised by the federal government. In *Norman*

1. 79 U.S. (12 Wall.) 457 (1870).
2. 75 U.S. (8 Wall.) 533 (1869).
3. 17 U.S. (4 Wheat. *315) 159 (1819).
4. 94 F.2d 495 (8th Cir. 1938).

v. Baltimore and Ohio, for example, the Supreme Court stated:

> The broad and comprehensive national authority over the subjects of revenue, finance, and currency is derived from the aggregate of the powers granted to the Congress, embracing the powers to lay and collect taxes, to borrow money, to regulate commerce with foreign nations and among the several states, to coin money, regulate the value thereof, and of foreign coin, and fix the standards of weights and measures, and the added express power 'to make all laws which shall be necessary and proper for carrying into execution' the other enumerated powers.[1]

17. The fact that banks are subject to the oldest and most pervasive system of regulation applied to any industry in this nation is testimony to the central role that such institutions play in the economy. As monetary institutions, commercial banks are the vehicles through which the bulk of the nation's money supply is created and held, so that government necessarily has a deep interest in the soundness and stability of the banking industry. As the primary mobilizers and allocators of credit, banks are also subject to the government interest attached to those functions. And, over time, government has become increasingly concerned with the uses to which bank credit is put.

18. That there are national economic goals to be obtained by, among other things, a properly functioning monetary system is beyond question. The Employment Act of 1946 legislated economic goals, which were expanded in the Humphrey-Hawkins Act of 1978. The latter calls

1. 294 U.S. 240, 303 (1935).

upon the President, the Congress, and the monetary authority to achieve "national economic priorities and objectives."[1] Nor is there any question of the importance of the banking system, and of the structure of that system, to the achievement of such goals. The Supreme Court was explicit on this point in *U.S. v. Philadelphia National Bank* when, in dealing with a significant structural question involving the proposed merger of two Pennsylvania banks, it said:

> Banking operations are varied and complex; 'commercial banking' describes a congeries of services and credit devices. But among them the creation of additional money and credit, the management of the checking account system, and the furnishing of short-term business loans would appear to be the most important. For the proper discharge of these functions *is indispensable to a healthy national economy,* as the role of bank failures in depression periods attests.[2]

19. It is against this background that I find it easiest to consider the interstate banking question and the issues posed by Connecticut's Interstate Act. One must begin with the manner in which the federal government has shaped the present structure. In the McFadden Act of 1927 (as amended in 1933) the federal government concluded that its own institutions (national banks), as well as those state-chartered banks that had joined the Federal Reserve System, should not operate branches over any broader geographic area than the states in which they were

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1. 60 Stat. 23 (1946); Pub. L. No. 95-523, 92 Stat. 1487 (1978).

2. 374 U.S. 321, 326-27 (1963). (Emphasis added).

located.[1] Then, in an awkward effort to provide parallel treatment for those banking organizations designated as bank holding companies, Congress in 1956, in the Bank Holding Company Act, directed that an agency of the federal government (the Federal Reserve Board) should not approve the acquisition of a bank by a bank holding company if such bank was not located in the state in which the holding company did its principal business. However, in Section 3(d)—the so-called "Douglas Amendment"—the Federal Reserve Board was permitted to consider an application for an out-of-state acquisition if the statutory law of the receiving state explicitly permitted entry by this means.[2]

20. Geographic restraints on banking are founded on a variety of motives, most of which will not pass the test of economic analysis. They are, nonetheless, real, and range from a desire to preserve the soundness of the banking system by restricting competition to a fear of large concentrations of banking resources. Whatever the motives, the effect of geographic restraints on the banking structure is profound. The federal government, historically at least, has opted for a pluralistic or fragmented banking structure by taking the actions noted above, knitting the system together through a federal program of deposit insurance. But these have been federal decisions, implemented by federal law, and working through federal agencies.

21. An incidental effect of these federal decisions was to place each state in a position to fashion its own banking

1. 12 U.S.C. 36(c).

2. 12 U.S.C. 1842(d).

structure, i.e., branching or no branching; holding company banking (one-bank or multi-bank) or no holding company banking. To be sure it was always understood that the federal government could reverse this arrangement any time that it chose, at least for its bank and its agencies. Nor were the states given unrestricted authority over the banking structures within their own territories. The Bank Merger Act of 1966, for example, placed in the federal banking agencies authority over bank mergers.[1] Most recently, the Garn-St Germain Act of 1982 permitted federal agencies to arrange interstate acquisitions of failing, major commercial banks.[2] In each instance, it was concluded that the overall national interest in achieving a sound, competitive banking structure justified the exercise of this authority by the federal government.

22. Still, it is generally recognized that, within the bounds laid down by the Constitution and federal law, each state is able to determine the characteristics of its own banking structure. However, this "right" does not translate into a right to determine regional structure. There is not, so far as I am aware, any doctrine in the law of "regional states' rights." Indeed, I believe it is well settled that any multi-state arrangement which will have a

1. 12 U.S.C. 1828(c).

2. 12 U.S.C. 1823(b). Section 116 of Garn-St Germain provides that "notwithstanding section 3(d) of the Bank Holding Company Act or any provision of law, state or federal, or of the constitution of any state," in the case of a failed commercial or failing mutual savings bank, where the bank has assets in excess of $500 million, the FDIC may arrange for its acquisition by an out-of-state bank holding company. In selecting a purchaser, preference must be accorded possible in-state purchasers, following certain criteria set forth in the statute. If an out-of-state purchaser is selected, preference must be accorded to those in contiguous states.

significant negative impact on states excluded from such an arrangement and/or have a significant negative impact on efforts to achieve national economic goals would be offensive both to economic principles and to constitutional principles.

23. Connecticut's Interstate Act is clearly offensive to economic principles. Its effect, when taken in conjunction with the Massachusetts' statute and possibly other statutes in the New England states, is to create a kind of "common market" for interstate banking that benefits some banking institutions in New England and penalizes banking institutions in the excluded states, as well as those Connecticut banking institutions with business oriented toward excluded states. The benefits and penalties are easily illustrated.

24. Absent the formation of the new banking region, bank holding companies in any state in the Union may conduct a variety of banking businesses in Connecticut, subject only to an inability to do a deposit business through a bank subsidiary. Thus, prior to passage of the Interstate Act, bank holding companies headquartered, say, in Massachusetts and New York were on an equal competitive footing in Connecticut, in that they could do any kind of banking or bank-related business permissible under federal and state law for out-of-state banks or bank holding companies, but could not combine these activities with a deposit-taking business. Such a combination, heretofore available in Connecticut only to Connecticut banks, is a powerful competitive tool. But with passage of the Interstate Act, Massachusetts bank holding companies are provided with the new competitive tool while those in New

York are denied it. Thus even though, as will be shown later, there would appear to be a much closer economic relationship between Connecticut and New York than between Connecticut and Massachusetts when it comes to local banking markets, it is the New York bank holding companies that are suddenly placed in a subordinate competitive position in Connecticut as compared with Massachusetts companies. In effect, the Connecticut and Massachusetts legislatures, acting in concert, have decided that certain banking institutions will grow faster than would otherwise have been possible, while certain other banking institutions will grow more slowly than would otherwise have been possible, the distinction being solely whether they are located within or outside of the protective geographic area. Even within the protected area the two legislatures have altered significantly the relative competitive positions of banking organizations, enhancing the growth prospects of banking institutions whose markets and opportunities lie within the protected area, and diminishing, relative to their competitors, the competitive position and future growth prospects of banks whose markets and opportunities are directed toward the excluded states.

25. The issue is broader, of course, than just the relative positions of bank holding companies in the three named states. Wherever any group of states decides to set up a common market and exclude some states from that market, the effect will be to penalize the business concerns in the excluded states. This in turn must have an adverse impact on the economic development of the excluded states. In the design of the American banking system parochial interests will likely always be an important consideration, but parochialism that goes so far as to affect adversely the

economic welfare of other states or the achievement of national economic goals obviously must be avoided.

26. It has been suggested that, quite apart from any economic considerations, constitutional principles have been satisfied by the Douglas Amendment. To be sure, another incidental effect of that Amendment was that a state having no statutory provision for entry by an out-of-state bank holding company may, by remaining silent, burden interstate commerce. But it is a far different matter, in my opinion, to conclude that Congress intended granting to a state anything more than the simple power to remove the burden in its case and admit any out-of-state bank holding company, subject to appropriate regulatory approval. As a student of banking history and of the significance of the locus of control of the monetary system, it is inconceivable to me that Congress in the Douglas Amendment intended to give to each state the significant additional power of compacting or arranging with selected other states to create multi-state banking regions; power, in effect, sufficient to balkanize the American banking structure.

27. Neither the Douglas Amendment itself nor the legislative history of that amendment contains any mention of such a sweeping purpose. That silence is significant; had Congress intended to divest itself of so large a part of its sovereign power over the nation's money and banking structure—an action completely at odds with a century-long experience to the contrary—it clearly could have, and would have, said so.

28. Indeed, nothing that Congress has done since 1956 suggests that it ever contemplated so great a delegation of its power to the states. For example, Congress would

scarcely have provided in the recent Garn-St Germain Act that the federal insurance agencies could arrange for the acquisition of any large failed commercial bank by an out-of-state bank holding company (giving specific preference to companies in contiguous states which, in Connecticut's case it might be noted, includes New York) if it thought that Connecticut and Massachusetts could seal themselves off, and possibly the rest of New England as well, from the reach of this law.[1]

29. In summary, the relationship between government and banking is intimately related to the sovereign exercise of the monetary power. That power has been firmly lodged in the federal government for well over a century. The individual states have retained the ability, within limits defined by the federal government, to fashion their respective banking structures. However, the states have not, in my opinion, been accorded a power to carve the nation up into separate banking regions. Such a power would not serve, as is clearly not consistent with, national economic interests, nor does it seem to be in accordance with the principles underlying the federal Constitution.

• • •

/s/

Carter H. Golembe

Sworn to before me this
29th day of September, 1983

/s/

Notary Public
My Commission Expires July 31, 1985

1. As noted earlier (see par. 21 and note), in selecting among purchasers and bids, certain priorities or preferences are accorded in-satte bidders. In the consideration of out-of-state bidders, preference or priority is accorded bids from institutions of the same type as the failing institution (e.g., commercial banks or thrifts) and to institutions from contiguous states.

APPENDIX NN

Affidavit of Patrick J. Mulhern (April 12, 1984)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NOS. 84-4047, 84-4051, 84-4053

CITICORP, a Corporation,

Petitioner,

against

THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

Respondent.

State of New York)
County of New York) ss.:

AFFIDAVIT OF PATRICK J. MULHERN

IN SUPPORT OF PETITIONER'S REQUEST FOR A STAY

PATRICK J. MULHERN, being duly sworn, deposes and says:

1. I am Senior Vice President and General Counsel of Citicorp and Citibank, N.A., a subsidiary of Citicorp. In this capacity I have knowledge of all the operations of Citicorp and its subsidiaries in Massachusetts, Connecticut, Rhode Island, Vermont, New Hampshire and Maine ("New England") and throughout the United States. I have been involved for more than twenty years in the banking industry. I follow closely, and am often directly involved in,

developments concerning the structure of the banking industry. I have been involved numerous times in dealings with the Board of Governors of the Federal Reserve System (the "Federal Reserve Board" or the "Board"), the Comptroller of the Currency, the Senate and House banking committees and other regulatory bodies. I am fully familiar with the facts set forth below.

2. I am submitting this affidavit in support of Citicorp's request that this Court stay the effectiveness of separate Orders of the Federal Reserve Board, dated March 26, 1984, approving the proposed merger of Bank of New England Corporation ("BNE") and CBT Corporation ("CBT"), and the proposed acquisition of Arltru Bancorporation ("Arltru") by Hartford National Corporation ("HNC"), respectively, pending final judicial review of Citicorp's challenge to those transactions. Copies of those Orders are attached as Exhibits A and B.

3. By this motion, petitioner is asking this Court to enter a stay which would prevent, for a relatively short period of time, the above-mentioned bank holding companies from completing transactions which are the subject of challenges on serious constitutional grounds both in this Court and in the United States District Court for the District of Massachusetts. Granting this request will avert imminent, serious and irreparable injury to petitioner and to the public at large. Absent such an order, these companies will be able, in a matter of days, to achieve their stated goal of insulating themselves unfairly from outside competition by taking steps which quite probably can never be successfully undone.

4. The impact of the decision of this motion, however, is not limited to the transactions directly challenged here. Rather, it involves the structure of banking in the United States. By the decisions challenged here, the Board has removed the critical constitutional issues raised by Citicorp from any further administrative consideration, so that additional regional interstate bank acquisitions will not ordinarily present any significant issue for the Board to consider. Thus, if there is no stay in this case, regional interstate banking will become a reality across the U.S., and the nation will be irretrievably balkanized by regional banking zones (zones which will all exclude the four principal "money center" states, New York, Illinois, Texas and California). All this will substantially and irreparably injure petitioner and other bank holding companies in the excluded states and will have occurred without a single federal court ever reviewing, even cursorily, the merits of the constitutional issues raised by the recently enacted regionally restrictive interstate banking statutes, including the Massachusetts and Connecticut statutes challenged here. Mass. St. 1982 c. 626 (the "Massachusetts Act"); Conn. Public Act 83-411 (the "Connecticut Act").

Nature and Background of this Dispute

5. Citicorp is a "bank holding company" within the meaning of section 2(a)(1) of the Bank Holding Company Act of 1956, as amended, 12 U.S.C. §§ 1841 *et seq.* (the "BHCA"), with its principal place of business in New York. It owns all of the stock of four banks. In addition, Citicorp owns (directly or indirectly) all of the stock of various non-bank corporations. Collectively, these Citicorp subsidiaries make loans and offer a wide variety of other

financial services to customers residing and/or doing business in New York, Massachusetts, Connecticut, Rhode Island and other parts of the country.

6. BNE is a bank holding company which has its principal place of business in Massachusetts and owns a number of Massachusetts banks. CBT is a bank holding company which owns a Connecticut bank and has its principal place of business in Connecticut. Arltru, the owner of a Massachusetts bank, is a bank holding company which has its principal place of business in Massachusetts. HNC is a bank holding company which has its principal place of business in Connecticut and owns at least one Connecticut bank.

7. Through its subsidiaries, Citicorp competes with CBT, BNE, HNC and Arltru and certain of their respective subsidiaries in making loans and offering other financial services to customers residing and/or doing business in, among other places, Connecticut, Massachusetts and Rhode Island. As described below, and as set forth in detail in the February 13, 1984 affidavit of Clarke Coggeshall ("Coggeshall Aff.") and the February 10, 1984 affidavit of Daniel A. Saklad ("Saklad Aff."), both filed in a related District Court of Massachusetts litigation discussed below, consummation of the proposed BNE/CBT merger or the proposed HNC/Arltru acquisition would seriously and irreparably injure petitioner. (Copies of these affidavits are attached (without exhibits) as Exhibits C and D hereto.)

8. On or about November 14, 1983, BNE filed an application with the Federal Reserve Board for approval of

BNE's proposed merger with CBT, as required under Section 3 of the BHCA. Similarly, on or about October 19, 1983, HNC filed an application with the Board for approval of its proposed acquisition of Arltru.

9. If consummated, the proposed BNE/CBT merger would result in an amalgamated bank holding company controlling banks in both Connecticut and Massachusetts. Similarly, the proposed HNC acquisition of Arltru would, if completed, result in a Connecticut bank holding company controlling a Massachusetts bank.

10. Under the so-called Douglas Amendment to the BHCA, 12 U.S.C. § 1842(d), the Federal Reserve Board may not approve the application of a bank holding company to acquire

> any additional bank located outside of the State in which the operations of such bank holding company's banking subsidiaries were principally conducted on July 1, 1966 or the date on which such company became a bank holding company, whichever is later, unless the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication.

11. In an effort to fit within the exception to the general prohibition of interstate bank acquisitions established in the Douglas Amendment, BNE and HNC have cited the Connecticut Act and the Massachusetts Act, which purportedly authorize these transactions.

12. In relevant part, these statutes are virtually identical, authorizing an out-of-state bank holding company to

acquire control of a Connecticut or Massachusetts bank, respectively, only if the acquiring bank holding company is a "New England bank holding company"—that is, it has its principal place of business in Massachusetts, Connecticut, Maine, Vermont, New Hampshire or Rhode Island (hereinafter "New England") and is not owned by a company with its principal place of business outside of New England (hereinafter "the regional restriction provision").

13. Under these statues, many New England bank holding companies would be able to establish or acquire direct or indirect control of full service banks (as defined in Section 2(c) of the BHCA) in Connecticut and Massachusetts. In particular, BNE and HNC contend that those statutes authorize the Board to approve their planned transactions. In contrast, by virtue of the regional restriction provisions of the Connecticut and Massachusetts Acts, non-New England bank holding companies—such as Citicorp—are absolutely barred from controlling a Connecticut or Massachusetts bank.

14. In addition, as set forth in the Coggeshall Aff., Citicorp contends that the Connecticut and Massachusetts Acts are part of a compact (the "New England Compact") among Massachusetts, Connecticut and Rhode Island, which allows New England bank holding companies to acquire or establish full service banks and conduct full service banking operations throughout New England, while barring non-New England companies from engaging in the same activities. The history of the development of the New England Compact and the reasons for its formation are set forth in

the Coggeshall Aff. It is not seriously disputed, however, that the principal purpose of the series of laws comprising the New England Compact is to exclude the so-called "money center" bank holding companies, including specifically Citicorp, from competing fully in New England, in order to "protect" local banks from full scale competition or possible acquisition.

The Federal Reserve Board Orders

15. Pursuant to 12 U.S.C. § 1842(b), Citicorp filed comments with the Board vigorously opposing the applications of BNE and HNC. These submissions by Citicorp are virtually identical. (Copies of Citicorp's letter and Memorandum, both dated December 5, 1983, filed with regard to the BNE application are attached (without exhibits) as Exhibit E.) Citicorp contended that: (1) as a result of their blatant geographic discrimination, the Connecticut and Massachusetts Acts violate the Compact Clause, the Commerce Clause, the Supremacy Clause, the Equal Protection Clause, and the Due Process Clause of the United States Constitution, and several provisions of the Connecticut and Massachusetts Constitutions, respectively; and (2) therefore, those statutes cannot serve as the basis for any exception from the general prohibition against interstate bank acquisitions established by the Douglas Amendment, and the BNE and HNC applications should be rejected as unauthorized.

16. On March 26, 1984, the Board issued its Orders approving the BNE and HNC applications. In doing so, however, the Board plainly recognized that substantial constitutional issues were raised by those applications. As the

Board stated, "the issue is not free from doubt . . . ." Nevertheless, the Board did not analyze those issues under normal standards of constitutional adjudication. Rather, it approved those applications on the grounds that it did not find a "clear and unequivocal basis" for a finding that the Connecticut and Massachusetts Acts are unconstitutional. Indeed, since the Board's March 26 Orders, Chairman Volcker has testified to Congress that the Board's determination was made despite "serious questions both about the constitutionality of such arrangements and their implications for public policy." (Statement of Paul A. Volcker, Before the Subcommittee on Telecommunications, Consumer Protection, and Finance of the House Committee on Energy and Commerce, April 4, 1984, at 20, a copy of which is attached as Exhibit F.) Thus, unless stayed, the Board's Orders would allow the transactions to be consummated without any full decision of the merits of the constitutional issues which might require that the consolidations be barred.

17. On March 30, 1984, Citicorp filed with this Court its Petitions for Review of the Board's Orders. In addition, on April 2, 1984, Citicorp requested the Board to stay its Orders pending final review by the courts. (Copies of Citicorp's requests to the Board are attached hereto as Exhibit G.) On April 9, 1984, however, the Board rejected Citicorp's requests for stays of those transactions. (Copies of the Board's letters rejecting Citicorp's requests are attached as Exhibit H.)

18. Accordingly, Citicorp has been compelled to seek the requested stay from this Court. Citicorp also intends shortly to ask the court in *Citicorp* v. *Massachusetts Board*

of Bank Incorporation, Civil Action No. 83-3841C (filed December 7, 1983), to issue a preliminary injunction enjoining BNE, CBT and HNC (which are defendants in that case) from consummating their transactions pending resolution by the district court of the constitutional challenges to the Massachusetts Act and the New England Compact raised by Citicorp and certain of its subsidiaries in that case.

19. Citicorp has been forced to request this stay now because of the immediacy of the threatened consummation of the BNE/CBT and HNC/Arltru transactions and the irreparable injury to petitioner and the public that would then result. Pursuant to 12 U.S.C. § 1849(b) and Federal Reserve Board Regulation 12 CFR § 262.3(j)(l)(i), BNE/CBT and HNC/Arltru may consummate their transactions thirty days from the date of the Board's Orders, *i.e.,* April 25, 1984, unless those Orders are stayed. And, upon information and belief, they will do so as soon as that date arrives, only 13 days from today. If such consummation is not stayed, the structure of the entire banking industry will change irrevocably and petitioner will suffer irreparable injury, without any judicial or even plenary agency review of the constitutional issues relating to the Connecticut and Massachusetts Act and the New England Compact.

Changes Likely in the Status Quo of the Banking System if the Board's Orders Are Not Stayed

20. If the Court does not stay the effectiveness of the Orders of the Federal Reserve Board at issue here until the constitutional issues are finally decided, the status quo

will probably change permanently. Until reversed, the Board's decisions will remove the critical constitutional issues raised by petitioner from consideration at the administrative level. Since interstate bank acquisitions ordinarily will not present any other major issue under the BHCA, the Board presumably will approve all such transactions which come before it (absent unusual circumstances).

21. Based on my experience and involvement in interstate banking matters, I believe that this situation will result in a wave of interstate acquisitions, as companies move to consummate transactions before there is a judgment that the regionally restrictive interstate banking laws are unconstitutional. At least two other New England bank merger applications (both by Bank of Boston Corporation) are currently before the Federal Reserve Board. Moreover, many other New England bank holding companies will undoubtedly pursue mergers and acquisitions like those of BNE, HNC and Bank of Boston Corporation following any consummation of the BNE/CBT and HNC/Arltru transactions.

22. Even more significantly, consummation of these transactions will encourage other states to enact similar discriminatory, regionally restrictive interstate banking statutes, and to create new exclusionary regional banking zones. Indeed, the Board itself found that "no fewer than fifteen state legislatures are considering proposals that, if enacted, would create regional banking systems in every part of the country." Moreover, the Board stated that "should the New England interstate banking zone be upheld, a system of regional zones may develop in major areas of the nation." Order Approving the Merger of

BNE and CBT at 6. Based upon my experience, I agree. State legislatures will rush to enact regional banking laws before they are declared unconstitutional. These state actions, in turn, will serve as the purported basis for numerous other interstate bank transaction agreements, which, I believe, will be executed rapidly upon, if not well before, enactment of legislation which would permit consummation of those acquisitions. In my judgment, the acquisition activity that will result could be so great that the entire structure of banking in this country could change in the next six to twelve months.

23. Indicative of the momentum that the regional banking idea has acquired are the statutes enacted and bills introduced in the 1983-84 state legislatures, which are set forth in the following list. Significantly, the list clearly shows that the regions of the country have been gerrymandered so as to exclude the four "money center" states —New York, Illinois, Texas and California.

24. The 1983-4 statutes and bills include:

Region	*State Enacting or Considering Legislation*	*States in Region Excluded*
Northeast	Connecticut (enacted), Massachusetts (enacted), Rhode Island (enacted),	New York
South	Georgia (enacted), Florida, Kentucky (enacted), South Carolina	Texas
Midwest	Iowa, Minnesota, Missouri, Nebraska, Wisconsin	Illinois
West	Arizona, Oregon (enacted), Utah (enacted)	California

25. The existence—and even the prospect—of regional interstate banking arrangements effectively prevents Citicorp from negotiating seriously with suitable banks or bank holding companies in other states whose acquisition by Citicorp would allow Citicorp to provide full-service banking to customers in those states. And, of course, the opening of the door to a wave of interstate transactions by favored bank holding companies will allow those consolidating bank holding companies to entrench themselves on an interstate basis and obtain advantages which could never be dispelled. Thus, allowing the two Board-approved acquisitions to proceed would be an invitation for the country to segment itself into artificial and distorted banking zones which would bring irrevocable injury to New York based Citicorp and severe disruption to the existing structure of our banking system.

The Need for a Stay: Petitioner's Irreparable Harm

26. The changes in the status quo absent a stay will be so substantial that, even if this Court ultimately finds the regional interstate banking legislation to be unconstitutional, the huge number of already-consummated interstate bank consolidations will create its own economic reality, which will inevitably require consideration and accommodation in shaping the remedy. The issue will not simply be whether the BNE/CBT merger and the acquisition of Arltru by HNC—the matters specifically before the Court now—can be unscrambled, but whether all the mergers and acquisitions which will have been consummated by that time can be dissolved. To the extent these transactions are not undone, Citicorp will suffer irreparable harm from the

increased competition it will face permanently from these entrenched, interstate consolidated entities.

27. Moreover, as noted in the Coggeshall Aff. ¶ 44, Exhibit C, the mere enactment of the Massachusetts Act and formation of the New England Compact have already caused injury to petitioner by, *inter alia,* preventing it, as a practical matter, from engaging in meaningful acquisition or merger discussions with desirable Massachusetts banks, while allowing BNE, CBT, HNC, Arltru and others not only to participate in such discussions, but also to reach agreements and obtain regulatory approvals. Now, the harm to petitioner from these state actions will be magnified in both scope and irreparability. If the BNE/CBT and HNC/Arltru transactions are allowed to be consummated at this time, the number of desirable potential acquisition partners available to petitioner (assuming petitioner will eventually be allowed to participate in similar transactions) would be irretrievably reduced, both through the consummation of these transactions and through the execution of other acquisition agreements which would be encouraged by the consummation of the BNE/CBT and HNC/Arltru transactions.

28. Additionally, these bank holding companies would have a chance to gain a competitive edge which might *never* be undone and which would irreparably injure Citicorp's efforts to establish a meaningful foothold in the New England region. As described in detail in the annexed Saklad Aff. (¶¶ 10-21) and Coggeshall Aff. (¶¶ 31-48) (Exhibits C and D), which are incorporated herein by reference, these advantages include: a multi-state banking presence which will be of considerable attraction to both commercial and consumer customers; marketing, advertising and ad-

ministrative advantages, and enhanced name recognition; increased credit and service capabilities; and increased capital bases. These advantages for BNE, CBT, HNC and Arltru would injury non-New England bank holding companies such as Citicorp in their efforts to offer financial services in, *e.g.*, Massachusetts and Connecticut, and would substantially harm Citicorp's profits, existing customer relationships and good will in Massachusetts, Connecticut and other New England states. For example, the large regional bank holding companies generally have had the most significant relationships with medium and large size corporations located in their respective states, while money center bank holding companies, such as Citicorp, have generally been second or third in such relationships. The new larger regional bank holding companies with their overall additional lending capacities and capital positions would be in a position to eliminate the money center bank holding companies in these relationships. This is because the corporate customer could rely on the larger regional bank for all banking services, including deposit services on a local basis, whereas the money center bank holding companies cannot provide this full range of services locally.

29. Furthermore, if any can consolidate now, BNE, CBT, HNC and Arltru will gain considerable marketing advantages, including increased name recognition and entrenched customer relationships, and will achieve substantial administrative economies of operations, through their interstate market presence and consolidations. As a result, they will no doubt attract new customers away from, *inter alia*, Citicorp's subsidiaries, and enhance existing relationships. After obtaining these customers, these bank

holding companies will have a continuing competitive advantage in providing financial services to them even if divestiture were later required. It is axiomatic that bank customers first seek financial services from the bank (and, indeed, the branch and personnel) with which they have or had a prior relationship. Thus, if BNE, CBT, HNC and Arltru are allowed to consummate these transactions now, they will have a "head start" which will enable them to increase their market positions and customer bases permanently, regardless of any subsequent court order, to the irreparable injury of petitioner. Obviously, this injury will be increased greatly by the large number of other consolidated entities which would also be able to gain such a "head start."

30. Moreover, BNE, CBT, HNC and Arltru and other combining bank holding companies presumably will argue that the injury suffered by competitors during the period in which their respective transactions were in effect cannot be recovered by those competitors because the consolidations were approved by the Federal Reserve Board.

31. Furthermore, once consummated, these transactions will likely be irreversible. For example, if their transactions are later invalidated, BNE and HNC may well argue that they nevertheless should not be dissolved because they have consolidated non-bank subsidiaries, because of the potential injury to their shareholders or because of other reasons. Other consolidating companies undoubtedly will also make such arguments. In addition, even if a court were to desire to enter an order of divestiture, the inequities and hardships to stockholders and customers which could result from such divestiture might well prompt

various New England state legislatures to enact legislation intended to immunize transactions completed prior to the judicial determination of the illegality of the New England Compact and its component statutes. As a result, petitioner is faced with the substantial possibility that these transactions, and the injury they would cause petitioner will be permanent from the moment they are consummated.

The Need for a Stay: Protection of the Public Interest

32. Permitting these transactions to go forward now would be undesirable for yet another important reason—the potential adverse impact on the public. If these transactions are consummated at this time, and the regional interstate banking statutes are ultimately found to be unconstitutional, the courts presumably will have to either (a) order the unscrambling of a very large number of completed consolidations all across the country; or (b) leave in place interstate transactions entered into pursuant to unconstitutional statutes.

33. The first course would be very difficult; public confidence in the stability and soundness of the banking system would be ill-served by the upheaval caused by sudden widespread bank holding company dissolutions. Investors in the consolidated companies, of course, stand to lose a great deal of money. Customers face the prospect that the "unscrambled" bank holding company with which they find themselves dealing would not be able to provide the same kinds and quality of service that the "scrambled" entity could offer. For example, customers who had been drawn to a merged entity because of its expanded capital

bases could awake one day to discover that the entity on which they had been counting has been replaced by smaller entities unable to meet the customers' needs. Of course, these injuries may be compounded many times since the approval of this transaction would encourage further mergers and acquisitions.

34. The alternative solution—leaving the consolidated entities intact despite the illegality of their joinder—would be equally unpalatable, for it would mean abandoning fundamental legal principles to a *fait accompli.* It is clearly not only Citicorp—but also bank holding companies in all the states that are being discriminated against—who will be injured if the Board's Orders are effectuated.

35. Moreover, the public's interest in the enforcement of constitutional standards is particularly acute when, as here, the objective of the constitutional challenge is to encourage the establishment of free competition in the provision of financial services. Such increased competition would greatly benefit the public, allowing consumers and businesses to obtain the most service at the lowest possible cost.

The Need for a Stay: Combining Companies Will Suffer No Significant Harm

36. Although the proposed consolidation of BNE/CBT has been pending since June, and the proposed acquisition of Arltru by HNC has been pending since at least September, no circumstance has arisen to my knowledge which threatens harm to either of the transactions (apart, of course, from the challenges by Citicorp and others to the

constitutionality of the Massachusetts Act, the Connecticut Act and the New England Compact). If some change were to occur in, for example, the value of one of the companies, the parties would still be free to restructure their arrangements.

37. Indeed, any supposed harm which these companies might suffer from a short delay is insignificant compared to the very real harm they and the public would surely suffer if they are allowed to consolidate and later are forced to dissolve their transactions. Unscrambling would require the merged entities to find some way to distribute assets and liabilities, restructure management and allocate shareholder interests. The confusion and expense that would result from having to unscramble these transactions would far outweigh any legitimate advantage these companies might gain from consummating their transactions prematurely.

38. In contrast to the insignificant loss, if any, these bank holding companies might conceivably suffer if the Court grants petitioner's motion, the loss petitioner will suffer as a result of the consolidations is, as described above, certain and irremedial. If the Orders of the Board are not immediately stayed, and BNE, CBT, HNC and Arltru prevented from going forward with their transactions, the relief petitioner seeks by opposing their applications and appealing the Board's Orders will be of no avail in remedying the bulk of the harm stemming, directly and indirectly, from the consummation of these transactions. And that irreparable injury will have occurred without any court reviewing the merits of plaintiffs' constitutional challenge.

Expedited Status

39. Finally, because of the irreparable harm facing petitioner and the public as described above, the likelihood that many other interstate bank acquisitions will occur under regionally restrictive statutes if these transactions are consummated, and the merit of petitioner's constitutional challenge (which even the Federal Reserve Board recognized), petitioner asks the Court to grant it expedited treatment in hearing and deciding these Petitions for Review. This request for expedition is appropriate whether or not a stay is in place because of the substantial uncertainty as to the final outcome of these transactions affecting petitioner, the customers and shareholders of BNE, CBT, HNC and Arltru, and the public at large.

/s/

Patrick J. Mulhern

Sworn to before me this
12th day of April 1984

/s/

Notary Public

ROSE E. SIGNORELLO
Notary Public, State of New York
No.30-3060315
Qualified in Nassau County
Certificate in filed in New York County
Commission Expires March 30, 1985

APPENDIX OO

Affidavit of James W. Quinn (August 8, 1984)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 84-4047, 4051, 4053, 4081

NORTHEAST BANCORP, INC., UNION TRUST COMPANY and CITICORP,

Petitioners,

against

THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

Respondent,

and

BANK OF NEW ENGLAND CORPORATION, CBT CORPORATION, HARTFORD NATIONAL CORPORATION, BANK OF BOSTON CORPORATION, THE COMMONWEALTH OF MASSACHUSETTS and THE STATE OF CONNECTICUT,

Intervenor-Respondents.

AFFIDAVIT OF JAMES W. QUINN IN SUPPORT OF CITICORP'S MOTION FOR AN ORDER STAYING ISSUANCE OF THE MANDATE AND MAINTAINING THE STATUS QUO, AND IN OPPOSITION TO INTERVENORS' MOTION TO ACCELERATE ISSUANCE OF THE MANDATE

James W. Quinn, being duly sworn, deposes and says:

1. I am a member of the firm of Weil, Gotshal & Manges, 767 Fifth Avenue, New York, New York, attorneys for petitioner Citicorp ("petitioner") in this action.

2. Petitioner has instructed me to file an immediate petition for a writ of certiorari in this case, and we are preparing that petition.

Introduction

3. Recognizing the fundamental constitutional questions raised by the regionally restrictive Connecticut and Massachusetts interstate banking statutes, this Court on April 24, 1984 issued a stay of the March 26, 1984 Orders of respondent Board of Governors of the Federal Reserve System (the "Board") approving the merger of Bank of New England Corporation ("BNE") with CBT Corporation ("CBT") and the acquisition by Hartford National Corporation ("HNC") of Arltru Bancorporation, Inc. ("Arltru"). (Copies of the stay and petitioner's memorandum of law supporting the stay are attached as Exhibits A and B.)

4. On June 11, 1984, the Board stayed the third challenged Order, which had approved the acquisition by Bank of Boston Corporation ("BBC") of Colonial Bancorp, Inc. ("Colonial"). This Court has affirmed that stay. (Copies of the stay and this Court's affirmance are attached as Exhibits C and D.)

5. The Board Orders and the Board's arguments to this Court sought the guidance of the courts, and recognized that the fundamental constitutional questions involved in this case are "ultimately for the courts to decide." *See* Order Approving the Application of BNE at 10; Brief of Respondent at 16. (Copies of these documents are attached as Exhibits E and F.) As Board Chairman Paul A. Volcker has stated, the Board simply acted

based upon an "*assumption* of constitutionality." Statement of Paul A. Volcker, Chairman, Board of Governors of the Federal Reserve System, Before the Senate Committee on Banking, Housing and Urban Affairs, March 27, 1984, at 32 (emphasis added). (A copy of Chairman Volcker's March 27, 1984 statement is attached as Exhibit G.)

6. Moreover, Chairman Volcker has recently testified before Congress that regional banking compacts raise "serious questions both about the constitutionality of such arrangements and their implications for public policy." Statement of Paul A. Volcker, Before the Subcommittee on Telecommunications, Consumer Protection and Finance of the House Committee on Energy and Commerce, April 4, 1984, at 20. (A copy of Chairman Volcker's April 4, 1984 statement is attached as Exhibit H.)

7. On August 1, 1984, the Second Circuit affirmed the Orders of the Board approving the BNE-CBT, HNC-Arltru and BBC-Colonial transactions. Far from providing the Board with the guidance on the constitutional issues it had requested from the courts, the Second Circuit relied on and accorded "substantial deference" to the decisions of the Board. *See* slip op. at 9. (A copy of the Second Circuit's decision is attached as Exh. I.)

8. The Board, the Board Chairman and this Court have thus all recognized that fundamental constitutional issues are presented here. However, those issues are still unresolved, and petitioner respectfully requests that the Court stay its mandate and maintain the status quo pending prompt disposition of the case by the Supreme Court.

Effect on the Nation's Banking System

9. Consummation of the transaction at issue will be the first in a rapid series of steps that will change the present two-tiered banking system to a multi-tiered patchwork arrangement of law and mergers.

10. The haphazard nature of the regional laws was noted by Board Member Emmett J. Rice:

> "Finally, we come to the issue of regional interstate banking based on state action. Chairman Volcker expressed the Board's concern over this route to interstate banking in his congressional testimony on September 13, 1983. At that time, he expressed the view that regional banking would be a new form of Balkanization of the banking industry. Inconsistencies are already developing as states select their regional partners. For example, the Georgia law would allow entry by Kentucky banks, but the Kentucky law only allows entry by banks in states immediately adjacent to Kentucky."

Remarks of Emmett J. Rice, Member, Board of Governors of the Federal Resrve System, Before the National Association of Urban Bankers, June 21, 1984, at 10. (A copy of Governor Rice's remarks is attached as Exhibit J.)

11. The immediacy with which consummation of interstate transactions would proceed is apparent from the applications already filed with the Board or announced to the public. BBC, a Massachusetts bank holding company, has already applied to the Board for permission to acquire RIHT Financial Corporation, Inc., a Rhode Island bank holding company; HNC, a Connecticut bank holding company, has announced its intention to operate a bank in

Rhode Island; and Fleet Financial Group, Inc., a Rhode Island bank holding company, has applied to the Board to acquire *de novo* banks in both Massachusetts and Connecticut. Nor is the move toward regional banking limited to New England. Georgia, Florida, North Carolina and South Carolina have recently enacted regionally restrictive legislation setting up a Southeastern banking region, and Trust Company of Georgia has already announced plans to merge with Florida's Sun Banks, Inc.

Irreparable Harm to Petitioner

12. In addition to this nationwide impact, the Court's August 1, 1984 decision will also directly affect petitioner's operations throughout New England. As a result, upon consummation of the proposed transactions, petitioner will suffer serious and irreparable harm. Among the injuries to petitioner will be: (1) loss of desirable potential acquisition partners; and (2) loss of customers and revenue to the combined entities, due to the increased capital bases, multi-state banking presence, increased credit and service capabilities and name recognition advantages obtained by the combined entities as a result of the transactions. The serious harm to petitioner that will flow from these transactions is discussed in detail in the April 12, 1984 Affidavit of Patrick J. Mulhern in Support of Petitioner's Request for a Stay ("Mulhern Aff."), at ¶¶ 26-31, and the February 13, 1984 Affidavits of Clarke Coggeshall and Daniel A. Saklad, filed in a related action, at ¶¶ 31-48 and¶¶ 10-21, respectively. (Copies of these affidavits, without Exhibits, are attached as Exhibits K, L and M, respectively.)

13. The harm suffered by petitioner may never be recovered. Even if the transactions were later unscrambled,

customers drawn to one of the consolidated entities will not automatically discontinue doing business with the bank with which they have developed a relationship. Moreover, the transacting companies may well argue that unscrambling their transactions is no longer practicable or fair, and that damages cannot be awarded since their transactions were consummated pursuant to Board Orders. Although the transacting companies now allege that their proposed transactions can be unscrambled, they intend to take steps on the basis of which they may later allege that unscrambling is difficult or impossible. Following consummation of its merger, the BNE-CBT entity intends to acquire Maine National Corporation. HNC intends to obtain a Rhode Island bank after acquiring Arltru. BBC intends to acquire RIHT Financial Corporation, Inc. after it acquires Colonial.

14. The injury to petitioner described above will be compounded many times since consummation of the BNE-CBT, HNC-Arltru and BBC-Colonial transactions will encourage numerous similar and equally harmful transactions, both in New England and throughout the United States. As a practical matter, it presumably will be difficult to stay such other transactions if the instant transactions are permitted to proceed. The parties to the future transactions will likely point to the completion of the transactions challenged here as a basis in equity for permitting their transactions also to proceed.

The Serious Questions as to the Legality of the Proposed Transactions Have Not Been Resolved

15. The nationwide distortion of the banking system that will most likely ensue upon the consummation of the challenged transactions will be most unfortunate in light of the serious questions that continue to exist regarding the constitutionality of the regionally restrictive interstate banking statutes challenged here. *See supra* at ¶¶ 3,5,8. Petitioner contends that the August 1, 1984 decision was incorrect in a number of ways and, *inter alia*, conflicts with substantial Supreme Court precedent. Petitioner's substantive arguments to the Second Circuit are set forth in detail in the Petitioners' Brief and the Petitioners' Reply Brief. (Copies of these briefs are attached as Exhibits N and O.)

Irreparable Harm to the Public

16. Given the uncertainty that still exists with regard to the constitutionality of the Connecticut and Massachusetts Acts, to allow the challenged transactions to go forward would subject the public to irreparable harm. If the transactions are consummated and the Massachusetts and Connecticut Acts subsequently are declared unconstitutional, the courts will be forced to either (1) order the unscrambling of the completed transactions (and all other such consolidations that have been accomplished across the country), or (2) leave in place interstate transactions entered into pursuant to unconstitutional statutes.

17. If the transactions are unscrambled, shareholders and customers will lose money or be deprived of banking services, and public confidence in the banking system will be

undermined. If the transactions are allowed to stand, competitors of the consolidated bank holding companies will suffer irreparable harm, the nation's banking system will be left skewed, and constitutional principles will be sacrificed to a *fait accompli*. *See* Mulhern Aff., Exh. K, at ¶¶ 32-35.

The Potential Harm to Petitioner, the Banking System and the Public Outweighs any Threat of Harm to Intervenor Bank Holding Companies

18. The challenged transactions have been pending for many months. No circumstances have arisen to my knowledge which threaten any of these transactions (apart, of course, from challenges to the Massachusetts and Connecticut Acts and the New England Compact). Moreover, petitioner will petition expeditiously for certiorari to the Supreme Court.

19. Any injury to intervenors that might arise as a result of a delay in consummating the challenged transactions cannot compare to the threat of harm to petitioner and the public that will result from the radical change in the nation's banking structure that will follow such consummation.

* * *

CONCLUSION

20. For the reasons set forth above, in the Mulhern Aff. and in petitioner's accompanying Memorandum of Law, petitioner respectfully requests that the Court stay its mandate and maintain the status quo pending disposition of this case by the Supreme Court.

21. Petitioner also respectfully requests that the Court refuse, under any circumstances, to accelerate issuance of the mandate or take any other action that would allow intervenors to consummate their transactions before, at the least, the Supreme Court has ruled on a petition for emergency relief, which petitioner would file immediately upon any adverse determination of the present motion.

/s/
James W. Quinn

Sworn to before me this
8th day of August, 1984

/s/

Notary Public
STEPHEN A. RADIN
Notary Public State of New York
No. 31-4803514
Qualified in New York County
Commission Expires March 30, 1986

APPENDIX PP

Brief of the Board of Governors of the Federal Reserve System to the United States Court of Appeals for the Second Circuit (April 19, 1984)

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 84-4047

NORTHEAST BANCORP, INC. et al.,

Petitioners,

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

Respondent.

Nos. 84-4051 and 4053

CITICORP

Petitioner,

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

Respondent.

RESPONSE OF RESPONDENT BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM TO PETITIONERS' MOTIONS FOR STAY

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II. ARGUMENT

A. *Introduction*

These cases raise the issue of the constitutionality of the Connecticut and Massachusetts regional interstate banking statutes, and specifically, whether section 3(d) of the BHC Act authorizes the discriminatory treatment afforded by these state statutes to non-New England bank holding companies. The decision of this Court on the merits of these cases will have effects far beyond the facts of the particular acquisition and merger at issue herein. The Board believes that a prompt decision by this Court on the merits is not only warranted by the magnitude of the substantive issues involved but may also mitigate the need for the issuance of a stay.

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